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No. 708

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

C. C. McCOY, DAVID W. SMALL, WILLIAM O'DONNELL, AND THOMAS MOSGROVE
Defendants in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the Circuit Court of the United States for the District of Washington, Southern Division.

FILMER-ROLLINS CO. PRINT, 424 SANSOME ST., S. F.

Records of Circuit Court

of Appeals

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In the Circuit Court of the United States for the District of Washington, Southern Division.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHRISTOPHER C. McCOY, DAVID W. SMALL, WILLIAM O'DONNELL, and THOMAS MOSGROVE,
Defendants.

No. 137.

Amended Complaint.

And now come the plaintiffs herein and for their amended complaint, in accordance with the requirements of the order of Court heretofore filed in this case, and permission having been granted by the Court to amend said complaint generally, plaintiffs allege:

I.

That pursuant to an advertisement made by the Postmaster General of the United States on the 16th day of September, 1899, inviting proposals for Covered Regulation Wagon Mail Messenger, Transfer, and Mail Station Service at New Orleans, Louisiana, Omaha, Nebraska, and San Francisco, California, from July 1st, 1890, to June 30th, 1894, made and published by John Wanamaker, Postmaster General of the United States, on their behalf, Christopher C. McCoy, one of the defendants here-

in made to the United States, through the said Postmaster General thereof, a proposal in writing to carry the mails of the United States, subject to all of the requirements contained in the advertisement of the Postmaster General, dated September 16th, 1889, aforesaid, between the dates aforesaid, on Route No. 76,475, between the postoffice at San Francisco, California, and the railroad stations, mail stations, and steamboat landings, and also between the several railroad stations and steamboat landings and mail stations, under the advertisement of the Postmaster General, dated September 16th, 1889, in the covered regulation wagons prescribed by the Department, for the sum of seven thousand seven hundred dollars ($7,700.00) per annum and in case the said proposal was accepted, the said C. C. McCoy did propose and agree to enter into a contract, with sureties to be approved by the Postmaster General, within thirty (30) days after date of acceptance; and in said proposal the said C. C. McCoy did further state that he made the same after due inquiry into, and with full knowledge of, all particulars in reference to the service; and also, after careful examination of the conditions attached to the advertisement, and with the intent to be governed thereby; that said proposal was signed by the said C. C. McCoy bidder, on the 9th day of November, 1889. And accompanying the said proposal was an oath duly taken by said C. C. McCoy before Marion D. Ekbert, a notary public of the State of Washington, and an officer qualified to administer oaths and which oath was in compliance with section 245 of an act of Congress, approved June 23, 1874, which said oath was as follows,

to wit: I, C. C. McCoy, of Walla Walla, bidder for carrying the mail on the Covered Regulation Wagon Mail Messenger, Transfer, and Mail Station Route No. 76,475, between the postoffice at San Francisco, Cal., and the railroad stations, mail stations, and steamboat landings, and also between the railroad stations, mail stations, and steamboat landings, as above, do swear that I have the ability, pecuniarily, to fulfill my obligations as such bidder; that the bid is made in good faith, and with the intention to enter into contract and perform the service in case said bid shall be accepted which said oath was signed by the said C. C. McCoy, and duly sworn to before the said notary public on the 9th day of November, 1899. That on the said 9th day of November, 1889, the said Christopher C. McCoy, as principal, and the said defendants David W. Small and William O'Donnell, as sureties, made, executed, and delivered their bond and writing obligatory, dated on the said date, and signed and sealed by the said defendants, wherein and whereby they acknowledged themselves to be held and firmly bound unto the United States of America in the sum of thirty thousand dollars ($30,000.00) lawful money of the United States, to be paid to the said United States of America, or their duly authorized officer or officers, to which payment, well and truly to be made and done, the said defendants, Christopher C. McCoy, David W. Small, and William O'Donnell, did bind themselves, their heirs, executors and administrators jointly, severally and firmly by the said bond, which was signed and sealed with the seals of the said parties on the 9th day of November, 1899.

II.

That the said bond, so executed by the said defendants, recited that whereas, by an act of Congress, approved June 23, 1874, entitled "An act making appropriations for the service of the Postoffice Department for the fiscal year ending June 30, 1875, and for other purposes, it is provided that every proposal for carrying the mail shall be accompanied by the bond of the bidder, with sureties approved by the Postmaster General," in pursuance whereof, and in compliance with the provisions of said law, this bond is made and executed, subject to all the terms, conditions, and remedies thereon in said act provided and prescribed, to accompany the foregoing annexed proposal of the said Christopher C. McCoy, bidder; that said bond was conditioned that if the said bidder, as aforesaid, should within such time after his bid is accepted, as the Postmaster General had prescribed in said advertisement, to wit, within sixty (60) days of the acceptance of said bid, enter into a contract with the United States of America, wih good and sufficient sureties, to be approved by the Postmaster General, to perform the service proposed on said bid, and further, to perform said service according to his contract, then the said obligation should be void, otherwise to be in full force and obligation in law, and in witness whereof, on the 9th day of November, 1889, the said Christopher C. McCoy, David W. Small, and William O'Donnell did sign and execute said bond.

III.

That the said bond was approved by Daniel Stewart, the postmaster at Walla Walla, Washington, on the 10th day of November, 1899, and was duly forwarded to the Postoffice Department of the United States, as required by law and the regulation of the said Department, and was by it received.

IV.

That said bid and proposal, so made by the said Christopher C. McCoy was accepted by the Postmaster General of the United States, and due notice thereof was given to the said bidder; and, thereafter, on the 21st day of January, 1890, a contract in writing was entered into between the United States of America, acting in that behalf by their Second Assistant Postmaster General, and said Christopher C. McCoy, the said bidder, as contractor and principal and the said William O'Donnell, Thomas Mosgrove and D. W. Small, as sureties, in which contract it was recited, provided and agreed that whereas the said C. C. McCoy had been accepted according to law as contractor for transporting the mails on Route No. 76,475, being the covered regulation wagon mail messenger, transfer, and mail station service at the city of San Francisco, California, under an advertisement issued by the Postmaster General on the 16th day of September, 1889, for such service, which advertisement was referred to, and made by the said reference a part of said contract, and all new and additional service of said kinds which might at any time during the term of the said contract be required in said

city, at seven thousand seven hundred dollars ($7,700.00) per year for and during the term beginning the 1st day of July, 1890, and ending June 30, 1894; and that therefore the said contractor and his said sureties did jointly and severally undertake, covenant, and agree with the United States of America, and did bind themselves to carry said mail, using therefor wagons of the kind thereinafter described, in sufficient number to transport the whole of said mail whatever might be its size, weight, or increase, during the term of said contract, and within the time fixed within the pamphlet advertisement of the Postmaster General, dated September 16, 1889, and to further so carry said mail until the said schedule should be altered by the authority of the Postmaster General, as therein provided, and then to carry the same according to said altered schedule, to carry the said mails in such a safe and secure manner, free from wet and other injury, in substantial one or two horse wagons of sufficient capacity for the entire mail; the wagons to be employed in the performance of the service were to be built with closed bodies, paneled from bed or sill to the height of an ordinary wagon body; above to be built of plain wood, panel set off with moulding, lined with canvas, with curved roofs; the rears were to be opened below by a gate, to drop to a level with the floor of the wagon, to fasten by means of a catch when shut; above by door hinges or spring hinges, so arranged that it shall shut tight against the gate and lock. And that said wagons were further described in said contract and it was agreed that in case

it was desired to increase or decrease the size of such wagons that the said increase or decrease should be made in exact proportions as to height and length, the Postmaster General reserving the right to vary at any time, when in his judgment the service might require, and plan or form of wagons to be used in the service. And, further, the said C. C. McCoy and his said sureties did agree to take the mail from, and deliver it into, the postoffices, mail stations and cars at such points, and at such hours, under the directions of the Postmaster at San Francisco, California, approved by the Postmaster General, as would secure dispatches and connections and facilitate distribution, and at the contractor's expense for tolls and ferriage; and to furnish the number of regulation wagons that, in the opinion of the Postmaster at San Francisco, California, would be sufficient for the prompt and proper performance of the service, including extra wagons to take the place of those that might be temporarily unserviceable, delayed waiting for trains or withdrawn from service for repairs; and to be accountable and answerable in damages to the United States, or to any person aggrieved, for the faithful performance by the said contractor of all the duties and obligations in said contract assumed, or which might then or thereafter be imposed upon the said contractor by law in said behalf; and further, to be answerable and accountable in damages for the careful and faithful conduct of person or persons who might be employed by the said contractor and to whom the said contractor should commit the care and transportation of the mails, and for the faithful performance of the duties

which were then or might thereafter by law be imposed upon such person or persons in the care and transportation of said mails; and further that the said contractor should not commit the care and transportation of the mail to any person under sixeen (16) years of age, or to any person not of good moral character, or who had not taken the oath prescribed by law, or who could not read and write the English language. Each driver, it was agreed, should wear when on duty, the prescribed cap or hat, prescribed in the pamphlet advertisement of September 16, 1889. And, further, to discharge any driver, or other person employed in performing mail service, whenever required by the Postmaster General so to do; and not to transmit by themselves, or any of them, or by their agents, and not to be concerned in transmitting, commercial intelligence more rapidly than by mail; not to carry, otherwise than in the mail, letters, packets or newspapers which should go by mail; and to account for and pay over any money belonging to the United States which might come into the possession of the contractor, his sureties or employees; and that the foreign mails in transit across the territory of the United States should be deemed and taken to be mails of the United States; and to carry postoffice blanks, mail locks and mail bags, and all other postal supplies; and to convey, whenever requisite to do so, one railway postoffice clerk, a substitute, or a messenger, on the driver's seat of each wagon; and to perform all new or additional or changed covered regulation wagon mail messenger, transfer, and mail station

service that the Postmaster General may order at the city of San Francisco, California, during the term of said contract, without additional compensation, whether caused by change of location of postoffice, stations, landings, or the establishment of others than those existing at the date thereof or rendered necessary, in the judgment of the Postmaster General, for any cause, and to furnish such advance wagons or extra wagons from time to time for special or advance trips as the Postmaster General might require, as a part of such new or additional service. For which service, when properly performed, and the evidence thereof should have been filed in the office of the Second Assistant Postmaster General, the said C. C. McCoy, contractor, was to be paid by the United States the sum of seven thousand seven hundred dollars ($7,700.00) a year, quarterly, in the months of November, February, May and August, through the postmaster at the city of San Francisco, California, or otherwise, at the option of the Postmaster General, as therein after stipulated, or to be suspended and withheld in case of delinquency. And it was further stipulated and agreed by the said contractor and his sureties that the Postmaster General might change the schedule and termini of the route, vary the routes, increase, decrease, or extend the service thereon, without change of pay; and that the Postmaster General might discontinue the entire service whenever the public interest, in his judgment should require such discontinuance; but for a total discontinuance of service the contractor should be allowed one month's extra pay as full indemnity. And it was further stipulated and agreed in

said contract that for a failure to deliver not beyond the control of the contractor, or for any delay or interference with the prompt delivery of the mail at the post-office, mail stations, depots, and landings, or for carrying the mail in a manner different or inferior to that in said contract thereinbefore specified; for suffering the mail to be wet, injured, lost, or destroyed; or for any other delinquency or omission of duty under this contract; for all or any of which the contractor should forfeit, and there might be withheld from his pay such sum as the Postmaster General might impose as fines or deductions, according to the nature and frequency of the failure or delinquency. And, further, that the Postmaster General might annul the said contract for repeated failures; for violating the postal laws; for disobeying the instructions of the Postoffice Department; for refusing to discharge a carrier or any other person employed in the service, when required by the department; for transmitting commercial intelligence or matter that should go by mail, contrary to the stipulations of said contract; for transporting persons so engaged, as aforesaid; whenever the contractor should become a postmaster, assistant postmaster, or member of Congress; and whenever, in the opinion of the Postmaster General, the service could not be safely performed, the revenues collected, or the laws maintained. And, further, that such annulment should not impair the right of the United States to claim damages from said contractor and his sureties under said contract; but such damages, might for the purpose of setoff or counterclaim, in the settlement of any claim of said contractor, or his

sureties, against the United States, whether arising under said contract, or otherwise, be assessed and liquidated by the auditor of the Treasury for the Postoffice Department. And it was further stipulated and agreed in said contract by the said contractor and his sureties that the said contract might, in the discretion of the Postmaster General, be continued in force beyond its express terms for a period not exceeding six months, until a new contract with the same or another contractor should be made by the Postmaster General. And, further that no member of, or delegate to, Congress should be admitted to any share or part of said contract, or to any benefit to arise therefrom; and, further, that the said contract was to be subject to all the conditions imposed by law, and the several acts of Congress relating to postoffices and post roads.

V.

Which said contract was signed by the said C. C. McCoy on the 10th day of January, 1890, and by the said sureties on the 21st day of January, 1890, and was signed by the Second Assistant Postmaster General on the 3rd day of March, 1890; and that the said contract then and there became the binding obligation and agreement of the said mentioned parties; and that the said Christopher C. McCoy, after signing the said contract on the 10th day of January, 1890, took and subscribed upon the said contract an oath that he, the said Christopher C. McCoy, being employed in the care, custody, and conveyance of the mail, as contractor on Rourte No. 76,475, being Covered Regulation Wagon Mail Messenger, Transfer, and Mail

Station Service at San Francisco, California, would faithfully perform all of the duties required of him, and abstain from everything forbidden by the laws in relation to the establishment of postoffices and post roads within the United States; and that he would honestly and truly account for and pay over any money belonging to the said United States which might come into his possession or control; and, also that he would support the Constitution of the United States; which said oath was taken and subscribed to before M. D. Peck, a notary public in and for the District of Columbia, on the 10th day of January, 1890, and endorsed upon the said contract.

VI.

Plaintiffs further say that the said C. C. McCoy has failed and refused to comply with the contract herein before mentioned, and the said sureties, and each of them, both on said bond and on said contract, have failed and refused to comply with said contract on behalf of the said C. C. McCoy; and the terms and conditions of the bond have not been complied with, as more particularly hereinafter stated, and the penalty mentioned in said bond is thereby incurred by the said C. C. McCoy and the said mentioned sureties thereon, and the said bond is forfeited to these plaintiffs, as hereinafter more fully set forth.

VII.

That on the 14th day of March, 1890, the Postmaster General permitted the said C. C. McCoy to sublet the said contract; and that thereafter, from July 1, 1890, to June 30, 1894, the said contract was sublet by the said C. C. Mc-

Coy, with the consent of the Postmaster General, to one A. W. Branner, of San Francisco, California, at the rate of seven thousand five hundred dollars, ($7,500.00) per annum. And from November 10, 1890, the Postmaster General required the said contractor to perform additional service, making five (5) round trips daily, except Sunday, and two (2) round trips on Sunday, between the main postoffice and railroad stations adjacent thereto, without additional compensation, in accordance with the terms of the said contract. That on the 3d day of January, 1891, the Postmaster General did terminate the recognition of the subcontract, of A. W. Branner, to be effective on the 30th day of November, 1890, and did on said date recognize the subcontract of N. Wines, of San Francisco, California, at nine thousand nine hundred dollars ($9,900.00) per annum from the 1st day of December, 1890, until the 30th day of November, 1891, agreeable to the request of the said C. C. McCoy. That from February 16th, 1891, the Postmaster General required the said contractor to perform additional service between main postoffice and Station E, 1.61 miles, eight (8) round trips daily, except Sunday, and one (1) round trip on Sunday, without additional compensation, in accordance with the terms of the said contract. And the said Postmaster General from October 1, 1891, did require the contractor to supply substation K, a mail station in the city of San Francisco, with mail on the trips between the main office and the substation B, five (5) times a day, except Sunday, or more frequently if the same should be necessary, without increase of distance or pay, in accordance with the terms of the said contract. That

on the 8th day of May, 1893, the said C. C. McCoy and the said subcontractors did abandon the said contract and fail and refuse to perform the same. And on the 9th day of May, 1893, the Second Assistant Postmaster General did notify the said C. C. McCoy, care of Zevely and Finly of Washington, D. C., that unless the said C. C. McCoy should promptly put the service into operation he would be declared a failing contractor and that the service would be relet at his expense and that his sureties would be held subject to the penalties of law, and that the postmaster at San Francisco had been authorized to employ temporary service pending the resumption of the service of the said contractor at the rate of seventeen thousand five hundred dollars ($17,500.00) per annum; and on May 17th, 1893, the said C. C. McCoy having failed to perform the service on Route No. 76,475, an order was made by the Second Assistant Postmaster General declaring the said C. C. McCoy a failing contractor; that the said C. C. McCoy having been so declared a failing contractor, and proposals for service for the remainder of the term having been invited, and proposals being received, the contract for the performance of the service agreed to be performed by the said C. C. McCoy under the said contract and in carrying the mails as required under the said Route No. 76,475 the contract for the remainder of the service from August 14th, 1893, to June 30th, 1894, was awarded to Max Popper of San Francisco, California, at the rate of twelve thousand dollars ($12,000) per annum, this being the lowest bid received, and the said contract being so awarded by W. S. Bissell, Postmaster General.

And thereafter until the completion of the said term, the said Max Popper continued to deliver the mail as the said C. C. McCoy had himself agreed to do.

VIII.

That by reason of the failure of the said C. C. McCoy to carry the mails as he had agreed to do in his said contract, these plaintiffs were compelled to procure temporary service, and one J. M. Gorman did carry the mail under the said proposal, and as the said C. C. McCoy was compelled to do under the said contract, from May 5th to August 13th, 1893, for which services these plaintiffs did pay the said J. M. Gorman the sum of four thousand eight hundred and twenty-seven dollars and seventy-seven cents ($4,827.77). And that during the third quarter of the year, 1893, for failure to perform the service as agreed, the said C. C. McCoy was fined five dollars ($5.00), which said amounts are claimed as damages against the defendants herein. That the difference between the contract of the said C. C. McCoy at seven thousand seven hundred dollars ($7,700.00) per annum, and the contract of the said Max Popper at twelve thousand dollars ($12,000.00) per annum, from the 4th day of August, 1893, and the 30th day of June, 1894, was the sum of three thousand seven hundred and eighty-five dollars and eighty-seven cents ($3,785.87), which said amounts were properly chargeable to the said mentioned defendants. That as an offset to the said claim, for actual damages sustained by the Government, as aforesaid, the defendant, C. C. McCoy and his said sureties are entitled

to have deducted the amount of the transportation from April 1st to August 13th, 1893, which the said C. C. McCoy would have received had he complied with his said contract, to wit, the sum of two thousand eight hundred and forty-five dollars and sixty-five cents ($2,845.65). And due demand upon the said C. C. McCoy and the said defendants herein has been made by the plaintiffs for the amount due, but the said defendants and each of them have failed and refused, and do still fail and refuse to pay the same.

IX.

That all of the said contract was fully complied with on the part of these plaintiffs.

Wherefore, plaintiffs pray judgment against the said C. C. McCoy, William O'Donnell, Thomas Mosgrove, and D. W. Small in the sum of five thousand seven hundred and seventy-two dollars and ninety-nine cents ($5,772.99), actual damages sustained by these plaintiffs by reason of their failure to perform the said contract, and for their costs and disbursements in this action.

WM. H. BRINKER,
United States Attorney.

F. C. ROBERTSON,
Assistant United States Attorney,
Attorneys for Plaintiffs.

Due service this day acknowledged by receipt of copy, March 29, 1897.

THOMAS & DOVELL,
Attorneys for Defendants.

[Endorsed]: Filed March 29, 1897, in the United States Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the District of Washington, Southern Division.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

CHRISTOPHER C. McCOY, DAVID W. SMALL, WILLIAM O'DONNELL, and THOMAS MOSGROVE, Defendants.

No. 137.

Answer.

Come now the above-named defendants and for answer to the complaint of plaintiffs herein deny the same and each and every allegation therein contained.

THOMAS & DOVELL,
Attorneys for Defendants.

State of Washington, County of Walla Walla. } ss.

Thomas Mosgrove, being first duly sworn, deposes and says: I am one of the defendants above-named, know the contents of the foregoing answer, and believe the same true.

THOMAS MOSGROVE.

Subscribed and sworn to before me this 8th day of May, 1897.

[Seal] J. G. THOMAS,

Notary Public Residing at Walla Walla, Washington.

[Endorsed]: Filed May 10, 1897, in the United States Circuit Court. A. Reeves Ayres, Clerk. By Chas. B. Johnston, Deputy.

In the Circuit Court of the United States for the District of Washington, Southern Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

C. C. McCOY et al., Defendants.

No. 137.

Trial.

Now, on this 15th day of November, 1899, this cause coming on regularly for trial, the plaintiffs being represented by W. R. Gay, Esq., United States Attorney and C. E. Claypool, Esq., Assistant United States Attorney, and the defendants represented by W. T. Dovell, Esq., a jury being called, come and answer to their names as follows: Frank Hansen, Cyrus Davis, A. Mathoit, S. M. Davis, Chas. D. Chard, Jas. Fudge, M. M. Hart, Archie Dunnigan, J. L. Robinson, Wm. O'Rourke, Chas. Maxson, B. B. Witt—twelve good and lawful men, duly im-

paneled and sworn, the cause proceeds by the introduction of documentary evidence, at the close of which, the hour of adjournment having arrived, the further hearing of this cause is continued until 9:30 o'clock to-morrow morning.

In the Circuit Court of the United States for the District of Washington, Southern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
C. C. McCOY et al.,
Defendants.
No. 137.

Order for Entry of Judgment.

Now, on this 16th day of November, 1899, the hour of 9:30 o'clock having arrived, the jury in this cause being called, all answer to their names, all being present in their box, this cause proceeds. The counsel for the Government rests its cause. Whereupon the counsel for defendants moves the Court for a judgment of nonsuit, and the Court after hearing argument of respective counsel, grants said motion and a judgment of nonsuit is allowed, and the jury are discharged from further consideration of the cause.

In the Circuit Court of the United States for the District of Washington, Southern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
C. C. McCOY et al.,
Defendants.
No. 137.

Order Granting Motion for Nonsuit.

This cause came on to be heard on the 15th day of November, 1899, plaintiff appearing by Charles E. Claypool, Assistant United States Attorney, and defendants appearing by W. T. Dovell, their attorney, a jury being called are duly sworn to try said cause, and thereupon and at the close of the evidence introduced on behalf of plaintiff, the said defendants and each of them move the Court for a judgment of nonsuit because of the legal insufficiency of plaintiff's evidence to make out a prima facie case, and after argument of counsel, the Court being advised in the premises, said motion for nonsuit is granted.

To which order granting said motion plaintiff, by its attorney, duly excepts, which exception is allowed.

C. H. HANFORD,
Judge.

[Endorsed]: Filed November 16, 1899. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the District of Washington, Southern Division.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.
CHRISTOPHER C. McCOY, DAVID W. SMALL, WILLIAM O'DONNELL, and THOMAS MOSGROVE,
Defendants.
No. 137.

Assignment of Errors on First Appeal.

The plaintiff in this action, in connection with its petition for a writ of error, makes the following assignment of errors, which it is averred occured on trial of the cause, to wit:

1st. The Court erred in holding that the duly certified records, orders, balances, certificates and other papers and documents of the office of the auditor for the Post-office Department and from the other Departments of the Government, in relation to this said cause, as they were introduced and admitted upon the trial thereof in behalf of the plaintiff did not make out a prima facie case against the defendants and each of them.

2d. The Court erred upon the conclusion of the testimony for the plaintiff in granting the motion of the defendants for a judgment of nonsuit, because of the legal

insufficiency of the evidence of plaintiff to make out a prima case.

3d. The Court erred in discharging the jury from further consideration of the cause, as plaintiff had made out a case entitling it to judgment for the amount prayed for in its complaint.

4th. For other errors occurring upon the record and duly excepted to at the time by the plaintiff.

WILSON R. GAY,
United States Attorney.
C. E. CLAYPOOL,
Assistant United States Attorney.

[Endorsed]: Filed in the United States Circuit Court, District of Washington, February 1, 1900. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

UNITED STATES OF AMERICA—ss.

The United States Circuit Court of Appeals for the Ninth Circuit.

Writ of Error on First Appeal.

The President of the United States of America, to the Honorable, the Judges of the Circuit Court of the United States, for the District of Washington, Ninth Judicial Circuit, Greeting:

Because in the record and proceedings as also in the rendition of the judgment and order of nonsuit of a plea which is in the said Circuit Court before you, or some of

you, between the United States of America, plaintiff, and C. C. McCoy, David W. Small, William O'Donnell, and Thomas Mosgrove, defendants, a manifest error hath happened, to the great damage of the United States of America, plaintiff, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date of this writ, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 1st day of February, in the year of our Lord one thousand nine hundred, and of the Independence of the United States the one hundred and twenty-fourth.

A. REEVES AYRES,
Clerk of the Circuit Court of the United States, for the District of Washington.

By R. M. Hopkins,
Deputy Clerk.

Due and full service of within acknowledged this 3d day of February, 1900.

W. T. DOVELL,
Attorney for Defendants.

UNITED STATES OF AMERICA—ss.

Mandate.

The President of the United States of America, to the Honorable Judges of the Circuit Court of the United States for the District of Washington, Southern Division, Greeting.

Whereas, lately in the Circuit Court of the United States for the District of Washington, Southern Division, before you, or some of you, in a cause between the United States of America, plaintiff, and C. C. McCoy et al., defendants, No. 137, a judgment was duly filed and entered, which said judgment is of record in said cause in the office of the clerk of said Circuit Court (to which record reference is hereby made and the same is hereby expressly made a part hereof), as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of a writ of error agreeably to the act of Congress in such cases made and provided, fully and at large appears;

And whereas, on the 10th day of May, in the year of our Lord one thousand nine hundred, the said cause came on to be heard before the said Circuit Court of Ap-

peals, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, with instructions to said Circuit Court to take further action in accordance with the opinion of this Court.

(Oct. 8, 1900.)

You, therefore, are hereby commanded that such action and proceedings be had in said cause, in accordance with the opinion and judgment of this Court and as according to right and justice and the laws of the United States ought to be had, the said judgment of said Circuit Court notwithstanding.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 27th day of April, in the year of our Lord one thousand nine hundred and one.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed in the United States Circuit Court, District of Washington, May 7th, 1901. A. Reeves Ayres, Clerk. By H. B. Strong, Deputy.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

UNITED STATES OF AMERICA,
Plaintiffs in Error,
vs.
C. C. McCOY, DAVID W. SMALL, WILLIAM O'DONNELL, and THOMAS MOSGROVE,
Defendants in Error.

No. 599.
Monday,
Oct. 8, 1900.

Opinion of Circuit Court of Appeals.

Appeal from the United States Circuit Court, District of Washington, Southern Division.

This suit was brought by the United States against C. C. McCoy, as principal, and David W. Small, William O'Donnell, and Thomas Mosgrove, as bondsmen, for $5,772.99 and interest, alleged to be the amount of actual damages sustained by the United States on account of the failure of McCoy to perform a contract entered into by him with the United States for the transportation of mail matter on Route No. 76,475. On the the trial of the cause the Court below granted a motion for a judgment of nonsuit "because of the legal insufficiency of plaintiff's evidence to make out a prima facie case." The case is now before this Court upon the assigned error of this ruling.

It appears that on January 10, 1890, the defendant in

error C. C. McCoy and his codefendants as bondsmen entered into a contract with the United States for the transportation of mail in the city of San Francisco, California, under which the said McCoy was to furnish certain equipment for carrying the mails and to perform certain service described in the advertisement of the Postmaster General of September 16, 1889, inviting proposals for such service, and to perform all new or additional service of the same character which might at any time during the term of said contract be required in said city, for the sum of $7,700 per year. The term of the contract extended from July 1, 1890, to June 30, 1894. McCoy proceeded with his undertaking, being permitted by the Postmaster General to sublet the said contract on two different occasions, first, to A. W. Branner for the sum of $7,500 per annum, and second, on the 1st day of December, 1890, to N. Wines, for the sum of $9,900 per annum. From November 10, 1890, the Postmaster General required the contractor to perform additional service without additional compensation, in accordance with the terms of the contract; from February 16, 1891, a further service was required; and from October 1, 1891, still further service. It is alleged that on the 8th day of May, 1893, the said McCoy and the said subcontractors abandoned the said contract and failed and refused to perform the the same; that on the following day said McCoy was notified by the Postoffice Department that unless he should promptly put the service into operation he would be declared a failing contractor, that the service would

be relet at his expense, and that his sureties would be held subject to the penalties of law; also, that the postmaster at San Francisco had been authorized to employ temporary service pending the resumption of service of the said contractor, at the rate of $17,500 per annum; and on May 17, 1893, said McCoy having failed to perform the service on Route No. 76,475, an order was made by the Second Assistant Postmaster General declaring the said C. C. McCoy a failing contractor.

It is further alleged that by reason of this failure of the said McCoy to carry the mails as agreed, the Government was compelled to procure temporary service from May 5th to August 13, 1893, for which services the amount of $4,827.77 was paid; that in addition to this amount the said McCoy was fined $5 for failure to perform the agreed service during the third quarter of the year 1893.

A contract was awarded to one Max Popper, of San Francisco, for the performance of the service during the remainder of the term, namely, from August 14, 1893, to June 30, 1894, at the rate of $12,000 per annum, this being the lowest bid obtainable, and in accordance therewith the said Max Popper continued to deliver the mail as the said C. C. McCoy had himself agreed to do. The difference between the amount of the contract to McCoy and that to Popper for the specified time is $3,785.87, which is claimed to be chargeable to the defendants in error. As an offset to this claim credit is given for the amount the said McCoy would have been entitled to receive had he complied with his contract to the end of the term, to wit, $2,845.65 leaving a remainder of $5,772.99,

the actual damage claimed by the plaintiff by reason of the failure of McCoy to perform said contract.

The defendants made a general denial to the allegations of the complaint. On the hearing of the case the plaintiff put in evidence certain documents, as follows: A certified copy from the records in the auditor's office of the Postoffice Department of the account of C. C. McCoy as failing contractor for amount of actual damage to the United States; certified copy of postmaster of Walla Walla, Washington, to the auditor, that said postmaster had made demand on C. C. McCoy and upon two of his sureties for payment of $30,000; a certified copy of account for amount of bond of C. C. McCoy, failing contractor; copy of proposals and advertisements to bidders for mail transportation service; copy of contract and bond entered into by the defendants in error with relation to the transportation of mails on Route No. 76,475; recognitions by the Postmaster General of subcontractors for the service under this contract; requirements of Postmaster General for additional service by contractor; two telegrams from postmaster at San Francisco to department at Washington, D. C., regarding abandonment of service by McCoy; communications to the defendants from Postoffice Department regarding failing contract; orders of Postmaster General declaring McCoy a failing contractor and recognizing contracts for temporary service with J. N. Gorman and for service for balance of term with Max Popper; contract and bond of Max Popper for this service to completion of term; statements of various fines imposed upon McCoy while acting as contractor.

No other evidence was offered by the plaintiff, and its case rested upon this showing.

Wilson R. Gay, United States Attorney, and Chas. Ethelbert Claypool, Assistant United States Attorney for Plaintiffs in Error.

W. T. Dovell, Attorney for Defendants in Error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after the foregoing statement of facts, delivered the opinion of the court.

A material allegation of the complaint was "that on the 8th day of May, 1893, the said C. C. McCoy, and the said subcontractors did abandon the said contract and did fail and refuse to perform the same." The general denial of the answer placed this allegation of the complaint in issue, and it devolved upon the plaintiff at the trial to establish the fact alleged by competent proof. The statement of McCoy's account by the auditor of the Postoffice Department; the telegram of the postmaster at San Francisco to the Second Assistant Postmaster General, dated May 8, 1893, stating that the contract had been abandoned; the letter of the Second Assistant Postmaster General, dated May 17, 1893, and addressed to the postmaster at San Francisco, approving the action of the latter in employing temporary service for the route; the certificate of the Postmaster General, dated May 18, 1893, declaring that McCoy had failed to perform the service and was a failing contractor, were all legally insufficient to establish the fact that McCoy had wholly abandoned the per-

formance of his contract. The postmaster at San Francisco appears to have had knowledge of the fact, and all the subsequent proceedings were based upon his statement of the fact in the telegram to the Second Assistant Postmaster General, but his testimony as to the fact was not obtained in this case. Section 3962 of the Revised Statutes provides that the Postmaster General may make deductions from the pay of contractors for failures to perform service according to contract, and he is authorized to impose fines upon them for other delinquencies; but this authority does not extend to the making of a certificate that a contractor has wholly abandoned his contract, nor does it provide that if such a certificate is made it shall be admitted in evidence as proof of the fact of abandonment in support of a claim for damages incurred by reason of the increased expense of the service under a new contract. The Court was therefore right in holding that the documents offered in evidence by the plaintiff were legally insufficient to make out a prima facie case for damages on account of the alleged entire failure of McCoy to perform the service provided in his contract. But the statement of the account contains a charge of five dollars for a fine imposed by the Postmaster General upon the contractor for a delay or 16 hours on July 5, 1893, in dispatching 11 pouches of mail for the S. F. & S. C. R. P. O. The evidence that this fine was imposed is contained in a document authenticated by the Postmaster General under the seal of the department, as required by section 882 of the Revised Statutes, which provided that copies of any books, records, papers, or documents in any

of the Executive Departments, authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof. The document reciting the action of the Postmaster General in imposing this fine, authenticated in accordance with this section of the Revised Statutes, was offered and admitted in evidence, and was prima facie evidence that the fine had been imposed as authorized by section 3962 of the Revised Statutes. The accounting officers of the Post-office Department may certify to facts which come under their official notice. (U. S. v. Jones, 8 Peters, 375, 384; Bruce v. U. S., 17 How. 437, 441.) They had this evidence before them, and it was official information that the fine had been imposed. The statement of account was therefore prima facie evidence of this charge of five dollars, and if this evidence was not overcome by competent proof, entitled the United States to a verdict and judgment for that amount.

Judgment reversed, with instructions to the Court below to take further action in accordance with this opinion.

[Endorsed]: Opinion filed Oct. 8, 1900. F. D. Monckton, Clerk.

[Endorsed] Filed in the United States Circuit Court, District of Washington. May 8th, 1901. A. Reeves Ayres, Clerk. By H. B. Strong, Deputy.

In the Circuit Court of the United States for the District of Washington, Southern Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHRISTOPHER C. McCOY, DAVID W. SMALL, WILLIAM O'DONNELL, and THOMAS MOSGROVE,
Defendants.

No. 137.

Trial.

Now, on this 9th day of May, 1901, this cause coming on regularly for trial, the plaintiff being represented by Edward E. Cushman, Assistant United States Attorney, and the defendants being represented by W. T. Dovell, Esq., a jury being called came and answer to their names as follows: John Chandler, H. O. Peck, J. D. Burns, D. G. Ferguson, H. C. Phillips, Isaac O'Dell, Benj. Pranger, Harry Riffle, Geo. Snell, H. B. Kershaw, Fred W. Thiel, Bert. E. LaDue—twelve good and lawful men, duly impaneled and sworn to try the cause. The counsel for the Government moves the Court for a continuance of the cause, which motion is denied, and exception allowed. The cause now proceeds by the introduction of documentary evidence on behalf of the plaintiff, and plaintiff rests its case; the defendants offering no evidence the

cause is submitted without argument. Whereupon the Court instructs the jury to return a verdict for the plaintiff; to the instructions given the counsel for the plaintiff excepts and the exception is allowed, and now the jury, under the instruction of the Court, return the following verdict:

"We, the jury in the above-entitled cause, do find for the plaintiffs, and assess and allow as the amount of damages recoverable herein the sum of five dollars, this verdict being in accordance with the per-emptory instructions of the Court.

"H. B. KERSHAW,
"Foreman."

Whereupon the jury are discharged from further consideration of the cause.

In the United States Circuit Court for the District of Washington, Southern Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
C. C. McCOY et al., Defendants.
No. 137.

Notice.

To the above-named defendant and to W. T. Dovell, Esq., their attorney:

You are hereby notified and required to take notice that

the plaintiff has filed its motion for a new trial herein, a copy of which said motion is herewith served upon you.

EDWARD E. CUSHMAN,
Assistant United States Attorney.

Due service of the above notice and motion for new trial admitted this 10th day of May, 1901.

W. T. DOVELL,
Attorney for Defendants.

In the United States Circuit Court for the District of Washington, Southern Division.

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	No. 137.
C. C. McCOY et al., Defendants.	)	

Motion for New Trial.

Comes now the plaintiff, by Edward E. Cushman, Assistant United States Attorney, and respectfully moves the Court for a new trial of the above-entitled cause, on the ground of errors in law occurring at the trial and excepted to at the time by the plaintiff.

This motion is based upon the minutes of the Court and the record and proceedings on file herein.

EDWARD E. CUSHMAN,
Assistant United States Attorney.

[Endorsed]: Filed May 11, 1901. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the United States Circuit Court for the District of Washington, Southern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
No. 137.
C. C. McCOY et al.,
Defendants.

Order Denying Motion for New Trial.

This matter coming on regularly upon plaintiff's motion for a new trial herein, plaintiff appearing by Edward Cushman, Assistant United States Attorney, and defendants appearing by W. T. Dovell, their attorney, and the Court having listened to counsel and being fully advised, the said motion is denied, to all of which plaintiff excepts and its exceptions are allowed.

Done in open court this 11 day of May, 1901.

C. H. HANFORD,
Judge.

[Endorsed]: Filed May 11, 1901. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the United States Circuit Court for the District of Washington, Southern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs. No. 137.
C. C. McCOY et al.,
Defendants.

Judgment.

This matter coming on regularly for hearing on this 11th day of May, 1901, the plaintiff appearing by Edward E. Cushman, Assistant United States Attorney, and the defendants appearing by W. T. Dovell, their attorney; a jury having heretofore regularly returned into this Court a verdict against the defendants and in favor of the plaintiff for five dollars ($5.00), and the motion for a new trial having been made and denied herein:

It is, therefore ordered, adjudged, and decreed that the plaintiff have and recover from the defendants, and each of them, the sum of five dollars and its costs and disbursements herein, to be hereafter taxed according to law and the practice of this Court; and interest on the principal sum at the rate of six per cent per annum from this date until paid; and that execution issue therefor.

C. H. HANFORD,
Judge.

And now at the time of the rendition of this judgment the plaintiff excepts thereto and said exception is allowed by the Court.

C. H. HANFORD,
Judge.

[Endorsed]: Filed May 11, 1901. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the United States Circuit Court for the District of Washington, Southern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
C. C. McCOY et al.,
Defendants.
No. 137.

Petition for Writ of Error.

Now comes the United States of America, plaintiff by Wilson R. Gay, United States Attorney, and Edward E. Cushman, Assistant United States Attorney, and say that on or about the 9th day of May, 1901, this Court entered an order denying a continuance of the trial of the above-entitled cause, in which said order refusing said motion for a continuance certain errors were committed to the prejudice of the plaintiff; and that thereafter such proceedings were had and done that said cause proceeded to a trial by jury and certain instructions were given and re-

fused by the Court upon such trial, in which instructions given and refused certain errors were committed by the Court to the prejudice of the plaintiff; and that thereafter the Court denied plaintiff's motion for a new trial herein, in doing which the Court committed further errors to the prejudice of the plaintiff; and that thereafter a judgment was entered by this Court herein, wherein certain other errors were committed by the Court to the prejudice of the plaintiff, all of which said errors will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated may be sent to the said Circuit Court of Appeals.

WILSON R. GAY,
United States Attorney.
EDWARD E. CUSHMAN,
Assistant United States Attorney.

[Endorsed]: Filed May 11, 1901. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the United States Circuit Court for the District of Washington, Southern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
C. C. McCOY et al.,
Defendants.
No. 137.

Assignment of Errors.

Comes now the plaintiff in this case by Wilson R. Gay, United States Attorney and Edward E. Cushman, Assistant United States Attorney, and in connection with its petition for a writ of error, makes the following assignment of errors, which it is averred occurred upon the judgment and trial of this cause and prior thereto:

1st. The Court erred in holding that the plaintiff was not entitled to a continuance upon the showing and affidavit made and filed by it for that purpose.

2d. The Court erred, upon the completion of the plaintiff's testimony, no testimony being introduced by the defendants, to give the instruction requested by plaintiff's counsel.

3d. The Court erred in giving the instruction requested by defendants' counsel, and in holding that the duly certified records, orders, balances, certificates, accounts and other papers and documents from the office of the auditor of the Postoffice Department in relation to

said cause, as introduced and admitted upon the trial thereof in behalf of the plaintiff, did not make out a prima facie case against the defendants and each of them.

4th. The Court erred in refusing to grant plaintiff's motion for a new trial.

5th. The Court erred in entering its judgment upon said verdict.

WILSON R. GAY,
United States Attorney.
EDWARD E. CUSHMAN,
Assistant United States Attorney.

[Endorsed]: Filed May 11, 1901. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the United States Circuit Court for the District of Washington, Southern Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
C. C. McCOY et al., Defendants.
No. 137.

Order Allowing Writ of Error.

On this 11th day of May, 1901, came the plaintiff, by Wilson R. Gay, United States Attorney, and Edward E. Cushman, Assistant United States Attorney, and filed herein and presented to the Court its petition praying for the allowance of a writ of error intended to be urged

by it; praying also that a transcript of the record, proceedings, and papers upon which the order and judgment herein was made and rendered, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings be had as may be proper in the premises. In consideration whereof, the Court does allow the writ of error.

C. H. HANFORD,
United States District Judge, Presiding in said Circuit Court.

[Endorsed]: Filed May 11, 1901. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

UNITED STATES OF AMERICA—ss.

In the United States Circuit Court for the District of Washington, Southern Division.

UNITED STATES OF AMERICA, Plaintiff, vs. C. C. McCOY et al., Defendants.	)	No. 137.

Writ of Error.

The President of the United States of America, to the Honorable Judges of the Circuit Court of the United States for the District of Washington, Ninth Judicial Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment and order denying motion for a new trial in the above-entitled cause and action, which is in the said Circuit Court before you or some of you, between the United States of America, plaintiff, and C. C. McCoy, David W. Small, William O'Donnell, and Thomas Mosgrove, defendants, a manifest error hath happened, to the great damage of the United States of America, plaintiff, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given and said order therein made, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, that you have the same at the city of San Francisco, in the State of California, within thirty days from the 10th day of May, 1901, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 11th day of May, in the year of our Lord one thousand nine hundred and

one, and of the independence of the United States the one hundred and twenty-fifth.

[Seal] A. REEVES AYRES,

Clerk of the Circuit Court of the United States for the District of Washington.

By R. M. Hopkins,
Deputy Clerk.

This writ hereby allowed this 11th day of May, 1901.

C. H. HANFORD,

United States District Judge, Presiding in said Circuit Court.

Due and full service of the foregoing writ of error acknowledged this 11th day of May, 1901.

W. T. DOVELL,
Attorney for Defendants.

[Endorsed]: Filed May 11, 1901. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the United States Circuit Court for the District of Washington, Southern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
C. C. McCOY et al.,
Defendants.
No. 137.

Citation.

The President of the United States, Greeting, to C. C. McCoy, David W. Small, William O'Donnell, and Thomas Mosgrove:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, in said Circuit, within thirty days from the 10th day of May, 1901, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Washington, Southern Division, wherein the United States of America is plaintiff in error and you are the defendants in error, to show cause, if any there be, why the judgment rendered in favor of the plaintiff in error for the sum of five dollars and costs on the 11th day of May, 1901, as in the said writ of error

mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 11th day of May, in the year of our Lord one thousand nine hundred and one, and of the independence of the United States of America the one hundred and twenty-fifth.

[Seal] C. H. HANFORD,
United States District Judge, Presiding in said Circuit Court.

Due and full service of the above citation in behalf of appellees acknowledged this 11th day of May, 1901.

W. T. DOVELL,
Attorney for Appellees and Defendants.

[Endorsed]: Filed May 11, 1901. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the United States Circuit Court for the District of Washington, Southern Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
C. C. McCOY et al., Defendants.
No. 137.

Plaintiff's Proposed Bill of Exceptions.

This cause coming on regularly for hearing and trial on the 9th day of May, 1901, at ten o'clock A. M., and a

jury being duly impaneled and sworn to try said cause, an adjournment was taken until two o'clock of said day, at which time the plaintiff made a motion and affidavit for a continuance in words as follows:

"In the United States Circuit Court for the District of Washington, Southern Division.

UNITED STATES OF AMERICA, Plaintiff,		
vs.		No. 137.
C. C. McCOY et al., Defendants.		

Motion.

Comes now the plaintiff by Edward E. Cushman, Assistant United States Attorney, and moves the Court that the above-entitled cause and the trial thereof be continued over the present term, on the ground of the absence of material evidence and the witness T. J. Ford of San Francisco, California, a material witness upon the trial of the above-entitled cause, and in support of said motion refers to the records and files in this cause and his, the said Edward E. Cushman's, affidavit, herewith filed, and the files and record of this cause on appeal to the Circuit Court of Appeals for the Ninth Circuit, heretofore made herein, and the opinion rendered upon said appeal.

EDWARD E. CUSHMAN,
Assistant United States Attorney."

In the United States Circuit Court for the District of Washington, Southern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
C. C. McCOY et al.,
Defendants.
No. 137.

Affidavit of Edward E. Cushman.

United States of America,
District of Washington. } ss.

Edward E. Cushman, being first duly sworn, upon oath deposes and says: That he is the attorney for the plaintiff and Assistant United States Attorney for the District of Washington; that he cannot proceed at this time to the trial of the above-entitled cause, on account of the absence of material evidence and the absence of the witness by the name of T. J. Ford residing at San Francisco, California, upon whom he, affiant, depends for such material evidence; that upon the former trial of this cause and upon the decision of the appeal taken from the judgment of nonsuit at that time, it was ruled and decided both in this court and in the Court of Appeals that in order to make out a prima facie case in such action as this it was necessary to show, in addition to the

certified transcripts from the office of the auditor of the Postoffice Department and other record evidence in the Postoffice Department, by parol or other evidence a breach of the contract by the defendant, C. C. McCoy to carry mail and deliver the same in the city of San Francisco, as pleaded in the amended complaint in this action; that the only witness of whom affiant has or had any knowledge that could testify to this matter was the above-named T. J. Ford of San Francisco, who is now and was at the time of alleged breach of the contract herein sued on, to wit, on May 8th, 1893, Superintendent of Mails in the city of San Francisco; that as such it was his duty and he did superintend the receipt and delivery at the Postoffice in San Francisco by the defendant C. C. McCoy of all mails coming into the city of San Francisco, and likewise superintended and oversaw and had knowledge of the delivery to the said C. C. McCoy of all outgoing mails at the Postoffice in San Francisco; and that the said T. J. Ford would if present at the trial of this cause, testify that the said defendant, C. C. McCoy, his agents and servants, in the city of San Francisco, California, on the 8th day of May, 1893, absolutely and wholly abandoned his performance of the contract in that city to carry and transmit the United States mails from the various stations in that city to the postoffice, and from the postoffice to such various stations, during the term of said contract as set up in the said amended complaint, from the 1st day of July, 1890, to the last day of June, 1894; that upon said eighth day of May, and ever after that date, the said defendant, C. C. McCoy, his

agents and servants, wholly failed, neglected, and refused to carry, deliver or transmit from or to said postoffice and said stations in said city of San Francisco any of the United States mails, as he had contracted and agreed to do, or offer or attempt so to do.

Affiant further states that due diligence has been used to procure such evidence and the presence of said witness upon this trial; that on the 29th day of April, 1901, affiant filed herein a praecipe for subpoena for such witness, which is among the files in this case, and to which affiant refers; that affiant is informed and believes that said subpoena was immediately issued upon the filing of said praecipe and delivered to the United States marshal of this District for service returnable May 9, 1901, that affiant has this day, when this cause was called for trial and the absence of said witness ascertained, wired the postmaster at San Francisco and the United States Marshal at Seattle to ascertain whether said witness had been subpoenaed, if so when, and whether he was on his way to attend upon this Court as a witness in this case; that affiant is *unable the* cause of the absence of said witness, having received no answer to either of said telegrams at this the hour of two o'clock P. M.; that if said cause is continued for a later day in this term, or over this term, the attendance of said witness will be secured and no delay interposed in the trial of said cause on account of the absence of said witness.

EDWARD E. CUSHMAN.

Subscribed and sworn to before me this 9th day of May, 1901.

[Seal] A. REEVES AYRES,
Clerk.
By H. B. Strong,
Deputy Clerk United States Circuit Court.

The Court in denying said motion said: "It is a good deal of a question in my mind whether the Government is entitled to have a fair trial on the issue as to the abandonment of the contract. I set the case down for trial because I was asked to by the assistant attorney for the United States, and no opposition was made to it. The mandate from the Circuit Court of Appeals does not award a new trial. The court sustained the judgment of this court as to the main issue in the case but held that the Court erred in granting a nonsuit, because there was evidence enough in the case on the trial to warrant a recovery on the part of the United States in the sum of five dollars. That is the opinion of the Court, and the mandate simply reverses the judgment and remands the cause here for further proceedings in accordance with that opinion. It is not remanded here with a mandate to award a new trial. Now, there is another reason why this application for a continuance is not sufficient. There is no showing of proper diligence under the statute. This witness could not be required to attend this Court if a subpoena was served on him. No steps appear to have been taken to obtain his deposition, which would be the only process of the Court that could be en-

forced to obtain his evidence. Section 876 expressly provides that in civil cases witnesses living out of the district in which the Court is held and a greater distance than one hundred miles from the place of holding the same cannot be compelled to attend. The motion for a continuance is denied."

To which ruling of the Court the plaintiff duly excepted and its exception was allowed.

Whereupon, plaintiff opened its case, and there was offered and admitted in evidence a transcript from the Postoffice Department, which transcript and the certificates attached thereto, and the portions thereof admitted in evidence, were as follows:

CERTIFICATE TO ACCOUNT FOR AMOUNT OF ACTUAL DAMAGE.

Treasury Department.

Office of the Auditor for the Postoffice Department,

June 1, 1895.

I, Geo. A. Howard, Auditor of the Postoffice Department, do hereby certify the annexed to be a true and correct statement from the records of this office, of the account, for amount of actual damage to the United States, of C. C. McCoy, failing contractor, on Route No. 76,475, in the State of California, pertaining to his accounts in the office of the auditor for the Postoffice Department.

In testimony whereof, I have hereunto signed my name and caused to be affixed my seal of office at the city of

Washington, District of Columbia, this first day of June, in the year of our Lord, one thousand eight hundred and ninety-five.

[Seal] GEO. A. HOWARD,
Auditor for the Postoffice Department.

Statement of Account for Amount of Actual Damage.

DR. *C. C. McCoy (Cal.) Failing Contractor, in account with the United States,* CR.

Route			Route		
76,475	To amount paid J. M. Gorman, for temporary service, from May 5, to August 13, 1883	$4,827 77	76,475	By transportation from April 1, to August 13, 1893	$2,845 65
"	To amount of fine, 3d quarter, 1893	5 00		By balance	5.772 99
"	To difference between his contract at $7,700.00 and the contract of Max Popper, at $12,000.00 per annum, from August 14, 1893, to June 30, 1894,	3,785 87			
		$8,618 64			$8,618 64
	To balance	$5,772 99			

Treasury Department,
Office of the Auditor of the Treasury,
For the Postoffice Department,
Washington, D. C., June 1, 1895,
GEO. A. HOWARD, Auditor.

[Endorsed]: Statement of Actual Damage Account. Failing Contractor, Route 76,475, State of California. Name, C. C. McCoy, Walla Walla, Washington. Sureties on Contract, W. O'Donnell, D. W. Small, T. Mosgrove, Walla Walla, Washington. Bond, $30,000, Actual damage $5,772.99.

[Endorsed]: 137. C. C. Plf's Ex. "B." Nov. 15, 1899. Filed April 2, 1899, In the U. S. Circuit Court. A. Reeves Ayres, Clerk. By H. B. Strong, Deputy. No. 599. U. S. Circuit Court of Appeals, for the Ninth Circuit. Defendants' Exhibit "B." Received March 26, 1900. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

Plaintiffs' Exhibit "A."

CERTIFICATE TO EVIDENCE OF DEMAND.

Treasury Department.

Office of the Auditor for the Postoffice Department,

I, Geo. A. Howard, Auditor for the Postoffice Department, do hereby certify the annexed to be a true and correct copy of the original certificate, now on file in this office, of Wm. O. Fallon, Postmaster at Walla Walla, in the State of Washington, pertaining to the accounts of C. C. McCoy, Failing Contractor on Route No. 76,475, in the State of California, in the office of the auditor for the Postoffice Department.

In testimony whereof I have hereunto signed my name, and caused to be affixed my seal of office, at the city of Washington, District of Columbia, this first day of June, in the year of our Lord one thousand eight hundred and ninety-five.

[Seal] GEO. A. HOWARD,

Auditor for the Postoffice Department.

Postoffice,

Walla Walla, Wash., March 30, 1895.

I, Wm. O. Fallon, Postmaster at Walla Walla, Washington, employed by the auditor of the Treasury for the Postoffice Department for that purpose, hereby certify that I made demand for payment of draft No. 5628, for $30,000.00 on C. C. McCoy failing contractor at Walla Walla, Washington, by letter mailed on the 1st day of March, 1895, addressed to the said failing contractor at

Walla Walla, Washington, his last usual place of abode, that a sufficient time has elapsed in the ordinary course of mail for said letter to have reached its destination and a reply to have been received; and that payment of said draft, in whole or in part, has not been received within the time designated in my instructions from the auditor of the Treasury for the Postoffice Department, to wit, thirty days.

I further certify that I made demand for payment of said draft upon D. W. Small and W. O'Donnell, the sureties of said failing contractor, by letter mailed on the 1st day of March, 1895, addressed to them at Walla Walla, Washington, payment of draft refused, see replies from C. C. McCoy and W. O'Donnell, no response from D. W. Small, their last usual place of abode; that a sufficient time has elapsed in the ordinary course of mail for said letters to have reached their destination and replies to have been received; and that payment of said draft, or any part of it, has not been received within the time designated in my said instructions from the auditor of the treasury for the Postoffice Department.

WM. O. FALLON,
Postmaster.

[Endorsed]: Filed April 2, 1899, in the United States Circuit Court. A. Reeves Ayres, Clerk. By H. B. Strong, Deputy.

CERTIFICATE TO ACCOUNT FOR AMOUNT OF BOND.

Treasury Department.

Office of the Auditor for the Postoffice Department.

June 1, 1895.

I, Geo. A. Howard, Auditor for the Postoffice Department, do hereby certify the annexed to be a true and correct statement from the records of this office, of the account, for amount of bond of C. C. McCoy, failing contractor on Route No. 76,475, in the State of California, pertaining to his accounts in the office of the Auditor for the Postoffice Department.

In testimony whereof I have hereunto signed my name, and caused to be affixed my seal of office, at the city of Washington, District of Columbia, this first day of June, in the year of our Lord one thousand eight hundred and ninety-five.

[Seal] GEO. A. HOWARD,

Auditor for the Postoffice Department.

Postoffice Department,

Washington, D. C., February 7, 1899.

I certify that the annexed are true copies taken from the files and records of this Department.

In testimony whereof I have hereto set my hand, and caused the seal of the Postoffice Department to be affixed, the day and year above written.

[Seal] A. EMORY SMITH,

Postmaster General.

U. S.

ADVERTISEMENT OF SEPTEMBER 16, 1889.

Inviting Proposals for

COVERED REGULATION WAGON

MAIL, MESSENGER, TRANSFER, AND MAIL STATION SERVICE

at

NEW ORLEANS, LA., OMAHA, NEBR., AND SAN FRANCISCO, CAL.

From July 1, 1890, to June 30, 1894.

JOHN WANAMAKER,
Postmaster General.

[Cut of eagle here.]

Proposals received until 4 P. M. of December 14, 1899. Decisions announced January 7, 1890. Contracts to be returned to the Department, duly executed, within thirty days from date of acceptance.

PROPOSALS FOR COVERED REGULATION WAGON MAIL MESSENGER, TRANSFER, AND MAIL STATION SERVICE.

Postoffice Department,
Washington, D. C., September 15, 1899.

Proposals will be received at the Contract Office of this Department until 4 P. M. of December 14, 1889, for carry-

ing the mails of the United States in the covered regulation wagons prescribed by the Department, on the routes herein specified in the States of Louisiana, Nebraska, and California, being covered regulation wagon mail messenger, transfer, and mail station service in the cities hereinafter named, between the postoffices, the railroad stations, the station offices, and the steamboat landings, between the several stations and landings and railroad depots, and between the postoffices and railroad stations, between the postoffices and station offices, and between the postoffices and steamboat landings and railroad depots, as prescribed herein, for the term below stated, viz:

New Orleans, La.

Omaha, Nebr.

San Francisco, Cal.

From July 1, 1890, to June 30, 1894.

Decisions announced on or before January 7, 1890.

Contracts to be returned to the Department, duly executed, within thirty days from date of acceptance of proposals.

Also from postoffice to steamboat landing, 5,000 feet, more or less, about six trips a week, and about three trips a week from steamboat landing to postoffice.

Bond required with bid, $10,000; check required with bid, $205.

Bond required with bid, $6,000; check $150.

Bond required with bid, $30,000; check, $400.

ROUTE No. 49101.

COVERED REGULATION WAGON MAIL MESSENGER SERVICE AT NEW ORLEANS, LA.

Number of wagon trips required for the performance of the service from railroad stations and steamboat landings to postoffices.

Railroad Station or Steamboat Landing.	Distance.	Number of trips daily, except Sunday.	Number of trips on Sunday.	Number of additional trips a week.	Total number of wagon trips a week.	Running time allowed from July 1, 1890.
	Feet.					*Mins.*
Illinois Central Railroad	6,600	2	2	.....	14	30
New Orleans and Northeastern Railroad	5,280	2	2	.....	14	25
Texas and Pacific Railroad	5,170	2	2	.....	14	25
Morgan's Louisiana and Texas Railroad	4,057	2	2	.....	14	20
Louisville, New Orleans and Texas Railroad	3,950	3	2	.....	20	25
Louisville and Nashville Railroad	756	3	2	.....	20	10
New Orleans and Gulf Railroad	8,976	1	0	.....	6	30
New Orleans and Port Vincent wharf	6,725	*	*	*	2	30
New Orleans and Grand Isle wharf	875	*	*	*	2	10
East Louisiana Railroad	5,280	1	1	.....	7	25

* Two trips a week.

ROUTE No. 49101—Continued.

Number of wagon trips required for the performance of the service from postoffice to railroad stations and steamboat landings.

Railroad Station or Steamboat Landing.	Distance.	Number of trips daily, except Sunday.	Number of trips on Sunday.	Number of additional trips a week.	Total number of wagon trips a week.	Running time allowed from July 1, 1890.
	Feet.					*Min.*
Illinois Central Railroad	6,600	2	2	.....	14	30
New Orleans and Northeastern Railroad	5,280	2	2	.....	14	25
Texas and Pacific Railroad	5,170	2	2	.....	14	25
Morgan's Louisiana and Texas Railroad	4,057	2	2	.....	14	20
Louisville, New Orleans and Texas Railroad	3,950	3	2	.....	20	25
Louisville and Nashville Railroad	756	3	2	.....	20	10
New Orleans and Gulf Railroad	8,976	1	0	.....	6	30
New Orleans and Port Vincent wharf	6,725	*	*	*	2	30
New Orleans and Grand Isle Railroad	875	*	*	*	2	10
East Louisiana Railroad	5,280	1	1	.....	7	25

* Two trips a week.

Also from postoffice to steamboat landing, 5,000 feet, more or less, about six trips a week, and about three trips a week from steamboat landing to postoffice.

NOTE—The probable additional service includes the carrying of the mails between the postoffice and the New Orleans and Grand Isle Railroad, seven trips a week.

ROUTE No. 49101—Continued.

TRANSFER SERVICE AT NEW ORLEANS, LA.

Number of wagon trips required to perform the transfer service.

From—	To—	Distance, station to station.	No. of trips daily, except Sunday.	Number of trips on Sunday.	Number of additional trips a week.	Total number of wagon trips a week.	Running time allowed from July 1, 1890.
		Feet.					*Mins.*
Morgan's Louisiana and Texas Railroad	Louisville and Nashville Railroad	2,000	2	2	....	14	15
Morgan's Louisiana and Texas Railroad	Illinois Central Railroad	8,000	1	1	....	7	30
Morgan's Louisiana and Texas Railroad	Louisville, New Orleans and Texas Railroad	6,888	1	1	....	7	25
Morgan's Louisiana and Texas Railroad	New Orleans and Northeastern Railroad	2,103	1	1	....	7	10
Morgan's Louisiana and Texas Railroad	Texas and Pacific Railroad	7,926	1	1	....	7	30
Illinois Central Railroad	Morgan's Louisiana and Texas Railroad	8,000	1	1	....	7	30
Louisville and Nashville Railroad	Morgan's Louisiana and Texas Railroad	2,000	2	2	....	14	15
Louisville and Nashville Railroad	Texas and Pacific Railroad	5,926	1	1	....	7	30
Louisville and Nashville Railroad	Louisville, New Orleans and Texas Railroad	4,888	1	1	....	7	20
Louisville, New Orleans and Texas Railroad.	Louisville and Nashville Railroad	4,888	1	1	....	7	20

ROUTE No. 49101—Continued.

MAIL STATION SERVICE AT NEW ORLEANS, LA.*

Number of wagon trips required for the performance of service between the post-office and mail stations.

From—	By—	To—	Distance, each way.	Trips daily, except Sunday.	Trips on Sunday.	Total number of trips a week.	Running time from July 1, 1890.

* None now required.

Bond required with bid, $10,000; check required with bid, $205.

ROUTE NO. 57362.

COVERED REGULATION WAGON MAIL MESSENGER SERVICE AT OMAHA, NEB.

Number of wagon trips required for the performance of the service from railroad stations and steamboat landings to postoffice.

Railroad Station or Steamboat Landing.	Distance.	Number of trips daily, except Sunday.	Number of trips on Sunday.	Number of additional trips a week	Total number of wagon trips a week.	Running time allowed from July 1, 1890.
	Feet.					*Mins.*
Union Pacific Railroad	5,215	12	12	....	84	20
Burlington and Missouri River Railroad	5,215	6	6	....	42	20
Chicago, Minneapolis, St. Paul and Omaha Railroad	2,492	5	5	....	35	20
Missouri Pacific Railroad	2,492	3	3	....	21	20

Number of wagon trips required for the performance of the service from postoffice to railroad stations and steamboat landings.

Railroad Station or Steamboat Landing.	Distance.	Number of trips daily, except Sunday.	Number of trips on Sunday.	Number of additional trips a week.	Total number of wagon trips a week.	Running time allowed from July 1, 1890.
	Feet.					*Mins.*
Union Pacific Railroad	5,215	11	11	. ..	77	15
Burlington and Missouri River Railroad	5,215	6	6	....	42	15
Chicago, Minneapolis, St. Paul and Omaha Railroad	2,492	6	6	....	42	15
Missouri Pacific Railroad	2,492	3	3	....	21	15

TRANSFER SERVICE AT OMAHA, NEBR.

Number of wagon trips required to perform transfer service.

From—	To—	Distance, station to station.	No. of trips daily, except Sunday.	Number of trips on Sunday.	Number of additional trips a week.	Total number of wagon trips a week.	Running time allowed from July 1, 1890.
		Feet.					*Mins.*
Union Pacific Railroad	Chi. Min., St. Paul and Omaha R. R. and Mo. Pacific R. R.	7,707	5	5	....	35	30

MAIL STATION SERVICE AT OMAHA, NEBR.*

Number of wagon trips required for the performance of service between the post-office and mail stations.

From—	By—	To—	Distance, each way.	Trips daily, except Sunday.	Trips on Sunday.	Total number of trips a week.	Running time from July 1, 1890.

* None now required.

Bond required with bid, $6,000; check, $150.

ROUTE No. 76475.

COVERED REGULATION WAGON MAIL MESSENGER SERVICE AT SAN FRANCISCO, CALIFORNIA.

Number of wagon trips required for the performance of the service from railroad stations or steamboat landings to postoffice.

Railroad Station or Steamboat Landing.	Distance.	Running time allowed from July 1, 1890.	TRIPS. DAILY. Sunday.	Monday.	Tuesday.	Wednesday.	Thursday.	Friday.	Saturday.	WEEKLY. Total.
	Rods.	*Mins.*								
Alameda Ferry	175	12	1	3	3	3	3	3	3	19
Oakland Ferry	1o7	12	9	17	17	17	17	17	17	111
Saucelito Ferry	166	12	.....	3	3	3	3	3	3	18
Tiburon Ferry	166	12	1	4	4	4	4	4	4	25
Southern Pacific R. R.	545	30	1	3	3	3	3	3	3	19
Washington St. wharf	166	12	1	.....	1	1	1	1	1	6
Mission St. wharf	185	15	.....	1	1	1	1	1	1	6
Pacific Coast Steamship Co.'s wharf, Eureka Mails	160	15	1	.....	.....	1	.....	.....	.....	2
Pacific Coast Steamship Co.'s wharf, B. C. Mails.	160	15	6 times each month.							
Pacific Mail Steamship Co.'s wharf, Panama Mails	424	25	2 times each month.							
Pacific Mail Steamship Co.'s wharf, Japan and China Mails	424	25	3 times each month.							
Oceanic Steamship Co.'s wharf, Australian Mails	.....	.....	*1 time each month.							
Oceanic Steamship Co.'s wharf, Hawaiian Mails	205	25	1 time each month.							
Mission St. wharf, Tahiti Mails	185	25	1 time each month.							

* Now performed by Oceanic Steamship Co.

NOTE.—One small and two large wagons are necessary to properly perform the service herein specified.

ROUTE No. 76475—Continued.

MAIL MESSENGER SERVICE AT SAN FRANCISCO, CAL.

Number of wagon trips required for the performance of the service from postoffice to railroad stations and steamboat landings.

Railroad Station or Steamboat Landing.	Distance.	Running time allowed from July 1, 1890.	TRIPS. DAILY. Sunday.	Monday.	Tuesday.	Wednesday.	Thursday.	Friday.	Saturday.	WEEKLY. Total.
	Rods.	*Mins.*								
Alameda Ferry	175	12	1	3	3	3	3	3	3	19
Oakland Ferry	167	12	12	17	17	17	17	17	17	114
Saucelito Ferry	166	12	1	3	3	3	3	3	3	19
Tiburon Ferry	166	12	1	4	4	4	4	4	4	25
Southern Pacific R. R.	545	30	2	3	3	3	3	3	3	20
Washington St. wharf	166	12	..	1	1	1	1	1	1	6
Mission St. wharf	185	15	..	1	1	1	1	1	1	6
Pacific Coast Steamship Co.'s wharf, Eureka Mails	160	15	..	.....	.....	1	.....	.....	1	2
Pacific Coast Steamship Co.'s wharf, B. C. Mails.	160	15	6 times each month.							
Pacific Mail Steamship Co.'s wharf, Panama Mails	424	25	2 times each month.							
Pacific Mail Steamship Co.'s wharf, Japan and China Mails	424	25	3 times each month.							
Oceanic Steamship Co.'s wharf, Australian Mls.*	.....	.....	.....							
Oceanic Steamship Co.'s wharf, Hawaiian Mails.	205	25	1 time each month.							
Mission St. wharf, Tahiti Mails	185	25	1 time each month.							

*Now performed by Oceanic Steamship Co.

TRANSFER SERVICE AT SAN FRANCISCO, CAL.

Between the termini of different railroad and steamboat routes. From—	To—	Distance.	Running time allowed from July 1, 1890.	TRIPS. DAILY. Sunday.	Monday.	Tuesday.	Wednesday.	Thursday.	Friday.	Saturday.	WEEKLY. Total.

This service is not rendered at present, there being no necessity for it.

ROUTE No. 76475—Continued.

MAIL STATION SERVICE AT SAN FRANCISCO, CAL.

Number of wagon trips required for the performance of the service between postoffice and mail stations.

Between Main Postoffice and Branch Offices, and between Branch Offices and Depots or Steamboat Landings.		Distance.	Running time allowed.	TRIPS.							
				DAILY.							WEEKLY.
From—	To and return.			Sunday.	Monday.	Tuesday.	Wednesday.	Thursday.	Friday.	Saturday.	Total.
		Rods.	*Mins.*								
Main P. O...	Station A...	470	18	1	5	5	5	5	5	5	31
Do ..	Station B...	560	20	1	5	5	5	5	5	5	31
Do ..	Station C...	920	35	1	5	5	5	5	5	5	31
Do ..	Station D...	170	12	1	7	7	7	7	7	7	43

NOTE.—No. 3 wagons are necessary to perform the service between the main office and stations.

Bond required with bid, $30,000; check, $400.

INSTRUCTIONS TO BIDDERS.

1. The foregoing schedules show the service required September 1, 1889, as near as can be stated. Bidders must inform themselves of the amount and character of the service that will be required during the next contract term.

2. The contractors under this advertisement will be required to perform, without additional compensation, any and all new or additional service that may be ordered from July 1, 1890, or at any time thereafter during the contract term, whether between postoffices or mail stations and railway or steamboat landings, or between railway stations and mail stations or steamboat landings, or between postoffices and mail stations (including mail stations, railway stations, and steamboat landings), now established or that may hereafter be established, whether

caused by changes in stations now established or by the creation of new stations, landings, or offices within said city, or any alteration of route rendered necessary by change in the site of postoffices or depots, or from any other cause. Bids must be made with this distinct understanding, and must name the amount per annum for the whole service, and not by the trip.

3. There will be no diminution of compensation for partial discontinuance of service, or increase of compensation for new, additional, or changed service that may be ordered during the contract term; but the Postmaster General may discontinue the entire service on any route whenever the public interest, in his judgment, shall require such discontinuance, he allowing, as full indemnity to the contractor, one month's extra pay.

4. The Postmaster General may annul a contract for repeated failures; for violating the postal laws; for disobeying the instructions of the Postoffice Department for refusing to discharge a driver or any other person having charge of the mail when required by the Department; for transmitting commercial intelligence or matter which should go by mail contrary to the stipulations herein, or for transporting persons so engaged; whenever the contractor shall become a postmaster, assistant postmaster, or member of Congress, and whenever, in the opinion of the Postmaster General, the service cannot be safely continued or the laws maintained on the route. Fines will be imposed for neglect of duty.

5. The Postmaster General may, in his discretion, continue in force, beyond its express terms for a period not

exceeding six months, any contract made under this advertisement until a new contract with the same or other contractors shall be made.

6. The distances given are believed to be substantially correct, but no additional pay will be allowed should they be greater than herein stated. Bidders must inform themselves as to the distances, the running time, the weight of the mails, the condition of hills, streets, toll-bridges, ferries, and obstructions of all kinds whereby expense may be incurred, and as to the probable increase, additional service, or changes likely to be rendered necessary. Claims for additional pay based on such grounds, or for alleged mistakes or misapprehension as to the service required, or for bridges destroyed or ferries discontinued, cannot be considered.

7. Foreign mails in transit across the territory of the United States shall, within the meaning of this advertisement, be deemed and taken to be mails of the United States.

8. The transfer service shall include the conveyance of all cases of postoffice supplies arriving for transit through the city.

9. Contractors will be required to convey on the driver's seat of each wagon, whenever necessary, one railway postoffice clerk, a substitute, or a messenger.

10. Drivers must be over sixteen years of age, of good moral character, and able to read and write the English language. They must take the oath prescribed by law, and must wear the prescribed cap or hat.

11. All service shall be performed in regulation wagons, unless otherwise mentioned in statement of

route. Full particulars as to style and construction of wagons required may be obtained on application to the Second Assistant Postmaster General, Washington, D. C. Wagons constructed according to the style adopted by the Postoffice Department, of a size about midway between the large two-horse and the large one-horse wagon, preserving the plan of the former, will be permitted, but for these at least two horses shall be used. The wagons shall be kept painted and varnished in a thorough manner, and ornamented according to specifications. They must also be frequently washed and kept clean and in good condition. New wagons are not required by the specifications, but only wagons of the prescribed pattern, in first-class condition, and to be as substantially constructed as new wagons. First-class horses shall be used.

12. When mails are delayed in arrival, wagons must be kept at the depots or landings until the arrival of such mails, and the same be conveyed to the postoffice without detention. Except in cases of accident, wagons containing mails must not be opened, or the mails therein contained changed while in transit. The mails must be carried inside of the wagons, and not on the outside or on the seat with the driver, and in no case shall any person be allowed to ride inside of the wagon containing mail.

13. The equipment of the contractor shall be subject to monthly inspections, and the refusal or failure of any contractor to keep his wagons, horses, and harness in good order and appearance, or to furnish proper drivers, so as to perform the service in a style creditable to the Department, shall be sufficient cause for the annulment of his contract and the reletting of the service at his expense.

14. Specifications for cap and hat: Cap—To be of all-wool blue flannel of good quality, three and one-fourth (3¼) inches high, solid leather fronts one and three-fourths (1¾) inches deep, with one (1) small regulation P. O. D. button on each side, a silver wreathe in front inclosing the words "U. S. Mail," and to have one oiled-linen cover. Hat—From June 16 to September 15 of each year, in lieu of the cap, a straw hat with rim not to exceed three and one-half (3½) inches in width and a crown not to exceed four (4) inches in height may be worn. A silver wreath inclosing the words "U. S. Mail" shall be placed on the front of the hat.

15. The wagons, horses, harness, and drivers are to be at all times subject to the approval and control of the postmaster; and the mails are to be taken from and delivered into the postoffices, mail stations, steamboats, and cars at such points, and at such hours, under his direction, approved by the Postmaster General, as will secure proper dispatches and connections, and at the contractor's expense for tolls and ferriage.

16. The number of wagons required must be sufficient, in the opinion of the postmaster, for the prompt and proper performance of the service.

17. The contractor will be required to provide and keep on hand a sufficient number of extra wagons to take the place of those which may be temporarily disabled, delayed, waiting for trains, or withdrawn from service for repairs, or required by the increase of service, so that the service shall always be promptly performed in regulation wagons.

18. Every proposal must be accompanied by a bond with two or more sureties approved by a postmaster, and in cases where the amount of the bond exceeds five thousand dollars ($5,000) by a postmaster of the first, second, or third class. Bids for service, the pay of which at the time of the advertisement exceeds five thousand dollars ($5,000), must be accompanied by a certified check or draft, payable to the order of the Postmaster General, on some solvent national bank, of not less than 5 per centum on the amount of the annual pay on such route, and in case of new or modified service, not less than 5 per centum of the amount of the bond accompanying the bid if the amount of said bond exceeds five thousand dollars ($5,000).

19. Sureties on the bond of a bidder must take an oath before an officer qualified to administer oaths that they are the owners of real estate worth, in the aggregate, a sum double the amount of said bond, over and above all debts due and owing by them, and all judgments, mortgages, and executions against them, after allowing all exemptions of every character whatever. A married woman will not be accepted as a surety, either on the bond of a bidder or upon a contract. Accompanying the bond of a bidder, and as a part thereof, shall be a statement of the sureties, under oath, showing the amount of real estate owned by them, brief descriptions thereof, and its probable value, where it is situated, and in what county and State the record-evidence of their titles exists. Any surety who swears falsely to this statement is deemed by the law guilty of perjury, and is punishable as is prescribed by law for that crime.

20. All checks deposited with bids will be held until contracts are executed, and the service commenced, to the satisfaction of the Postmaster General, by the accepted bidder. Checks indorsed payable to their order will then be returned by mail to the bidders at the addresses stated in their proposals, unless otherwise requested by bidders.

21. There should be but one route bid for in a proposal. Consolidation or combination bids ("proposing one sum for two or more routes") cannot be considered.

22. Bidders are cautioned to forward their proposals in time to reach the Department, or to file them, by the day and hour named in this advertisement, as bids received after that time will not be considered. If sent by mail or express, ample time should be allowed for their transit, as they cannot be deemed to be received at the Department until actually delivered at the contract office; neither can bids be considered which are without the bond, oath, or certificate required by section 245, act of June 23, 1874, and section 246, act of August 11, 1876. No withdrawal of a bid will be allowed unless the withdrawal is received twenty-four hours previous to the time fixed for opening the proposals.

23. No bidder for carrying the mail shall be released from his obligation under his bid or proposal, notwithstanding an award made to a lower bidder, until a contract for the designated service shall have been duly executed by such lower bidder and his sureties, and accepted, the service entered upon by the contractor to the satisfaction of the Postmaster General.

24. No contract for carrying the mail shall be made with any person who has entered, or proposed to enter, into any combination to prevent the making of any bid for carrying the mail, or who has made any agreement, or given or performed, or promised to give or perform, any consideration whatever to induce any other person not to bid for any such contract.

25. In case of failure of the accepted bidder to execute a contract within the prescribed time, or of the abandonment of service during the contract term, the service will be relet at the expense of the failing bidder or contractor, and any accepted bidder who shall wrongfully refuse or fail to enter into contract in due form, and to perform the service described in his proposal, may be deemed guilty of a misdemeanor, and on conviction thereof be fined and imprisoned therefor.

26. The Postmaster General reserves the right to suspend the award of contract on any route for a period not exceeding thirty days after the date fixed in this advertisement, with a corresponding allowance of time for the execution of contract, and to reject all bids on any route whenever in his judgment the interests of the service require it; and also to disregard the bids of failing contractors and bidders.

27. Postmasters are cautioned, under penalty of removal, not to approve the bond of any bidder before the proposal is completed and the bond is signed by the bidder and his sureties, and not until entirely satisfied of the sufficiency of the sureties. They are also cautioned not to divulge to any one the amount of any proposal certified

by them. Doing so will be sufficient cause for their removal.

28. No postmaster, assistant postmaster, or clerk employed in any postoffice shall be a contractor, or concerned in a contract for carrying the mail.

29. Bidders are requested to use the printed forms of proposals furnished by the Department, which may be obtained at the postoffice on each route herein advertised, and to apply at that office for information in regard to the service and its requirements.

30. Proposals should be sealed, superscribed "Proposals for Covered Regulation Wagon Mail Messenger Transfer, and Mail Station Service, City of ————," and addressed to the Second Assistant Postmaster General, Postoffice Department, Washington, D. C.

JOHN WANAMAKER,
Postmaster General.

PROPOSAL.

Proposals altered by erasures or interlineations of the route, the service, the yearly pay, or the name of the bidder, will not be considered.

Proposal opened, December 18, 1889.

The undersigned, C. C. McCoy, whose postoffice address is Walla Walla, County of Walla Walla, Territory of Washington, proposes to carry the mails of the United States, subject to all the requirements contained in the advertisement of the Postmaster General, dated September 16, 1889, being the advertisement inviting proposals for the Covered Regulation Wagon Mail Messenger, Trans-

fer, and Mail Station Service, from July 1, 1890, to June 30, 1894, on Route No. 76,475, between the postoffice at San Francisco, California, the railroad stations, mail stations and steamboat landings, and also between the several railroad stations and steamboat landings and mail stations, under the advertisement of the Postmaster General, dated September 15, 1888, in the covered regulation wagons prescribed by the Department, for the sum of seven thousand seven hundred dollars ($7,700.00) per annum; and if this proposal is accepted I will enter into contract, with sureties to be approved by the Postmaster General, within thirty days from the date of acceptance.

This proposal is made after due inquiry into, and with full knowledge of, all particulars in reference to the service; and, also, after careful examination of the conditions attached to the advertisement, and with the intent to be governed thereby.

Dated November 9, 1889.

C. C. McCOY, Bidder.

Bidder.

Oath required by Section 245 of an act of Congress approved June 23, 1874, to be affixed to each bid for carrying the mail, and to be taken before an officer qualified to administer oaths.

I, C. C. McCoy, of Walla Walla, bidder for carrying the mail on the Covered Regulation Wagon Mail Messenger, Transfer, and Mail Station Route No. 76,475, between the postoffice at San Francisco, California, and the railroad stations, mail stations, and steamboat landings, and also

between the railroad stations, mail stations, and steamboat landings, as above, do swear that I have the ability, pecuniarily, to fulfill my obligation as such bidder; that the bid is made in good faith, and with the intention to enter into contract and perform the service in case said bid shall be accepted. C. C. McCOY, Bidder.

Sworn to and subscribed to before me, a Notary Public for the county of Walla Walla, W. T., this ninth day of November, A. D. 1889, and in testimony thereof I hereunto subscribe my name and affix my official seal the day and year aforesaid.

[Seal] MARION D. EGBERT,
Notary Public.

Note.—When the oath is taken before a justice of the peace, or any other officer not using a seal, except a Judge of a United States Court, the certificate of the clerk of a court of record must be added, under his seal of office, that the person who administered the oath is duly qualified as such officer.

Bids must be accompanied by a certified check, or draft, on some solvent National Bank, payable to the order of the Postmaster General, when the bond required with bid exceeds $5,000 per annum. The amount of such certified check or draft is stated under the respective routes.

The proposal must be signed by the bidder or each of the bidders, and the date of signing affixed.

Direct to the "Second Assistant Postmaster General, Postoffice Department, Washington, D. C.," marked "Proposal for Covered Regulation Wagon Mail Messenger, Transfer, and Mail Station Service, City of ————."

BOND.

Directions—Insert the names of the principal and sureties in full in the body of the bond; also the date. The signatures to the bond should be witnessed, and the certificate on the inside should be signed by a justice of the peace, adding his official title, or, if signed by a notary public, he should affix his seal.

Know all men by these presents, that Christopher C. McCoy of Walla Walla, in the territory of Washington, principal, and David W. Small and William O'Donnell, of Walla Walla, in the territory of Washington, as sureties, are held and firmly bound unto the United States of America in the just and full sum of thirty thousand ($30,000.00) dollars, lawful money of the United States, to be paid to the said United States of America or its duly appointed or authorized officer or officers; to the payment of which, well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this ninth day of November, 1889.

Whereas, by an act of Congress approved June 23, 1874, entitled "An act making appropriations for the service of the Postoffice Department for the fiscal year ending June thirtieth, eighteen hundred and seventy-five, and for other purposes," it is provided: "that every proposal for carrying the mail shall be accompanied by the bond of the bidder, with sureties approved by a postmaster," in pursuance whereof, and in compliance with the provisions of said law, this bond is made and executed, subject to all

the terms, conditions, and remedies thereon, in the said act provided and prescribed, to accompany the aforegoing and annexed proposal of the said Christopher C. McCoy, bidder.

Now, the condition of the said obligation is such, that if the said Christopher C. McCoy, bidder, as aforesaid, shall within such time after his bid is accepted as the Postmaster General has prescribed in said advertisement of Route No. 76,475, to wit, within thirty days from the date of acceptance, enter into, and file in the Department, a contract with the United States of America, with good and sufficient sureties to be approved by the Postmaster General, to perform the service proposed in his said bid, and further shall perform said service according to his contract, then this obligation shall be void; otherwise, to be in full force and obligation in law.

In witness whereof we have hereunto set our hands and seals this 9th day of November, 1889.

[Bidder sign here.]

CHRISTOPHER C. McCOY. [Seal]

[Sureties sign here.]

DAVID W. SMALL. [Seal]

WILLIAM O'DONNELL. [Seal]

Witnesses: A. J. JONES,

M. D. EGBERT.

Note.—Any alteration, by erasure or interlineation, of a material part of the aforegoing bond, will cause it to be rejected, unless it appears by a note or memorandum, attested by the witnesses, that the alteration was made before the bond was signed and sealed.

When partners are parties to the bond, the partnership name should not be used, but each partner should sign his individual name.

A married woman will not be accepted as surety. Sureties are liable during the whole of contract term.

INTERROGATORIES.

The following interrogatories are prescribed by the Postmaster General, to be answered, under oath, by each of the sureties in the foregoing bond, and no bid will be considered in which these interrogatories are not fully and satisfactorily answered.

1. What amount in value of real estate is owned by you?

2. Of what description—town or city lots, improved or unimproved, or farming land, cultivated or uncultivated?

3. Where is it situated, county and State?

4. In what county and State does record-evidence of your title exist? (Answer fully on next page.)

Especial attention is called to the interrogatories to be answered fully below. The value, description, location, and place of record of real estate of each surety must be stated as required by the interrogatories; "ditto," "do," or ditto marks cannot be accepted for a statement.

OATH OF SURETIES.

Territory of Washington,
County of Walla Walla. } ss.

On this 9th day of November, 1889, personally appeared before me David W. Small and William O'Donnell, sureties in the foregoing bond, to me known to be the persons

named in said bond as sureties, and who have executed the same as such, who, being by me duly sworn, depose and say, and each for himself deposes and says, he has executed the within bond; that his place of residence is correctly stated therein; that he is the owner of real estate worth the sum hereinafter set against his name over and above all debts due and owing by him, and all judgments, mortgages, and executions against him after allowing all exemptions of every character whatever, the total sum thus assured amounting to ($60,000.00) sixty thousand dollars, being double the amount of the aforegoing bond.

And in answer to the foregoing interrogatories, each of the said sureties further deposes and says that the value, description, and location of his real estate is as follows:

Names of Sureties.	Value of Real Estate. (Answer to interrogatory No. 1.)	Description of Real Estate. (Answer to interrogatory No. 2.)	County and State where located. (Answer to interrogatory No. 3.)	County and State where Record-Evidence of Title is. (Answer to interrogatory No. 4.)
D. W. Small.	$30,000	Brick building and city property. Improved.	Walla Walla, city and county, W. T.	
Wm. O'Donnell	$30,000	Brick building and city property. Improved.	Walla Walla, city and county, W. T.	

[Sureties sign here.]

DAVID W. SMALL.

WILLIAM O'DONNELL.

Subscribed and sworn before me this 9th day of November, 1889.

MARION D. EGBERT,

Notary Public.

Note.—When the above oath is taken before a justice of the peace, or any other officer not using a seal, except a Judge of a United States Court, the certificate of the clerk of a court of record must be added, under his seal of office, that the person who administered the oath is duly qualified as such officer. If the oath is taken before a notary public and his seal is affixed, the certificate of the clerk of a court is not necessary.

CERTIFICATE OF POSTMASTER.

I, the undersigned, postmaster at Walla Walla, territory of Washington, after the exercise of due diligence to inform myself of the pecuniary ability and responsibility of the principal and his sureties in the aforegoing bond, and of the real estate owned by them, respectively, do hereby approve said bond, and certify that, in my belief, the said sureties are sufficient—sufficient to insure the payment of double the entire amount of the said bond; and I do further certify that the said bond was duly signed by Christopher C. McCoy, bidder, and David W. Small and William O'Donnell, his sureties, before signing this certificate.

Dated, November 10, 1889.

DANIEL STEWART,
Postmaster.

Postmasters will observe that the improper approval of the bond, or the certificate of the sufficiency of sureties therein, exposes them not only to dismissal, but also to fine or imprisonment. Sec. 781, Postal Laws and Regulations, 1887. The approval of the sureties must be by a

postmaster, and not by an assistant postmaster or other substitute, either in his own name or in the name of the postmaster.

[Endorsed]: Covered Regulation Wagon Mail Messenger, Transfer, and Mail Station Service. Route No. 76,475. City of San Francisco. (Advertisement of September 15, 1888.) (July 1, 1890, to June 30, 1894.) Proposal of C. C. McCoy. $7,700 Check, $400.

CONTRACTOR'S BOND.

UNITED STATES OF AMERICA.

Walla Walla, Walla Walla County, Washington.

Covered Regulation Wagon Mail Messenger, Transfer, and Mail Station Service in the City of San Francisco, Cal. No. 76,475; $7,700 per annum.

This article of contract, made the seventh day of January, eighteen hundred and ninety, between the United States of America (acting in this behalf by the Postmaster General) and C. C. McCoy, contractor, and William O'Donnell, Thomas Mosgrove, and D. W. Small, all of Walla Walla, Washington, as his sureties:

Witnesseth, that whereas C. C. McCoy has been accepted as contractor for transporting the mails on route No. 76,475, being the Covered Regulation Wagon Mail Messenger, Transfer, and Mail Station Service at the city of San Francisco, Cal., under an advertisement issued by the Postmaster General on the 16th day of September, 1889, for such service, and which advertisement is herewith referred to and made by such reference a part of this

contract, and all new or additional service of said kinds which may at any time during the term of this contract be required in said city, at seven thousand seven hundred dollars per year, for and during the term beginning the 1st day of July, 1890, and ending June 30, 1894.

Now, therefore, the said contractor and his sureties do, jointly and severally, undertake, covenant, and agree with the United States of America, and do bind themselves—

First.—To carry said mail, using therefor wagons of the kind hereinafter described in sufficient number to transport the whole of said mail, whatever may be its size, weight, or increase during the term of this contract, and within the time fixed in the pamphlet advertisement of the Postmaster General dated September 16, 1889; and to carry until said schedule is altered by the authority of the Postmaster General dated September 16, 1889; and so to carry according to such altered schedule; to carry said mails in a safe and secure manner, free from wet and other injury, in substantial one or two-horse wagons of sufficient capacity for the entire mail; the wagons to be employed in the performance of the service to be built with closed bodies, paneled from bed or sill to the height of an ordinary wagon-body; above to be built of plain wood, panel set off with moulding, lined with canvas, with curved roof; the rear shall open below by gate, to drop to a level with the floor of the wagon, to fasten by means of a catch when shut; above by door-hinges or spring-hinges, so arranged that it shall shut tight against the gate and lock. The double wagons in all cases, and the single wagons whenever the proper performance of

the service requires it, shall have double doors in the side, extending from the paneled frame of the body to the drip of the roof; these doors shall be hung on spring-hinges; the locks and hinges to be used on the doors of all wagons shall be of the same make and pattern as is on exhibition on the sample door in the office of the Second Assistant Postmaster General, at Washington, D. C. On the front shall be a seat for the driver, with foot-board, trimmed and finished in leather. The wagons shall be kept painted and varnished in a thorough manner, and ornamented according to specifications, and shall be frequently washed and kept clean, and at all times be kept in good order and appearance. The painting, as to colors, ornaments, and design, both on running-gear and body, shall conform to the painting and ornamenting shown in the colored drawings on exhibition at the office of the Second Assistant Postmaster General, at Washington, D. C. The bodies of such wagons shall be made to conform to the lithographic drawings of the side and rear elevations of both single and double wagons hereto appended and made part of this contract, giving scale of dimensions. In case it is desired to increase or decrease the size of said wagons, such increase or decrease shall be made in exact proportion as to height and length, the Postmaster General reserving the right to vary, at any time, when in his judgment the service may require it, the plan or form of wagon to be used in the service.

Second.—To take the mail from, and deliver it into, the postoffice, mail stations, and cars at such points, and at such hours, under the directions of the Postmaster at San

Francisco, Cal., approved by the Postmaster General, as will secure dispatches and connections and facilitate distribution, and at the contractor's expense for tolls and ferriage.

Third.—To furnish the number of regulation wagons that, in the opinion of the Postmaster at San Francisco, Cal., will be sufficient for the prompt and proper performance of the service, including extra wages to take the place of those that may be temporarily unserviceable, delayed waiting for trains, or withdrawn from service for repairs.

Fourth.—To be accountable and answerable in damages to the United States, or any person aggrieved, for the faithful performance by the said contractor of all the duties and obligations herein assumed, or which are now or may hereafter be imposed upon him by law in this behalf; and, further, to be so answerable and accountable in damages for the careful and faithful conduct of the person or persons who may be employed by said contractor and to whom the said contractor shall commit the care and transportation of the mails, and for the faithful performance of the duties which are or may be by law imposed upon such person or persons in the care and transportation of said mails; and, further that said contractor shall not commit the care and transportation of the mail to any person under sixteen years of age, nor to any person not of good moral character, or who has not taken the oath prescribed by law, or who cannot read and write the English language. Each driver shall wear when on duty the prescribed cap or hat described in the pamphlet advertisement of September 16, 1889.

Fifth.—To discharge any driver, or other person employed in performing mail service, whenever required by the Postmaster General so to do; not to transmit by themselves or any of them, or any of their agents, or be concerned in transmitting, commercial intelligence more rapidly than by mail; not to carry, otherwise than in the mail, letters, packets, or newspapers which should go by mail.

Sixth.—To account for and pay over any money belonging to the United States which may come into the possession of the contractor, his sureties or employees.

Seventh.—That foreign mails in transit across the territory of the United States shall, within the meaning of this contract, be deemed and taken to be mails of the United States.

Eighth.—To carry postoffice blanks, mail-locks and mail-bags, and all other postal supplies.

Ninth.—To convey, whenever requested so to do, one railway postoffice clerk, a substitute, or a messenger, on the driver's seat of each wagon.

Tenth.—To perform all new or additional or changed covered regulation wagon, mail messenger, transfer, and mail station service that the Postmaster General may order at the city of San Francisco, Cal., during the contract term, without additional compensation, whether caused by change of location of postoffice, stations, landing, or the establishment of others than those existing at the date hereof, or rendered necessary, in the judgment of the Postmaster General, for any cause, and to furnish such advance wagons or extra wagons from time to time for special or advance trips as the Postmaster General may require, as a part of such new or additional service.

For which service, when properly performed, and the evidence thereof shall have been filed in the office of the Second Assistant Postmaster General, the said C. C. McCoy, contractor, is to be paid by the United States the sum of seven thousand seven hundred dollars a year, to wit: Quarterly, in the months of November, February, May and August, through the Postmaster at the city of San Francisco, Cal., or otherwise, at the option of the Postmaster General; said pay to be subject, however, to be reduced or discontinued by the Postmaster General, as hereinafter stipulated, or to be suspended and withheld in case of delinquency.

It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster General may change the schedule and termini of the route, vary the routes, increase, decrease, or extend the service thereon, without change of pay; and that the Postmaster General may discontinue the entire service whenever the public interest, in his judgment, shall require such discontinuance; but for a total discontinuance of service the contractor shall be allowed one month's extra pay as full indemnity.

And it is further stipulated and agreed, that for a failure to deliver not beyond the control of the contractor, or for any delay or interference with the prompt delivery of the mail at the postoffice, mail stations, depots, and landings, or for carrying the mail in a manner different or inferior to that hereinbefore specified; for suffering the mail to be wet, injured, lost or destroyed; or for any other delinquency or omission of duty under this contract; for all or any of which the contractor shall forfeit, and there

may be withheld from his pay, such sum as the Postmaster General may impose as fines or deductions, according to the nature and frequency of the failure or delinquency.

And it is further stipulated and agreed, that the Postmaster General may annul this contract for repeated failures; for violating the postal laws; for disobeying the instructions of the Postoffice Department; for refusing to discharge a carrier or any other person employed in the performance of service, when required by the Department; for transmitting commercial intelligence or matter that should go by mail, contrary to the stipulations herein; for transporting persons so engaged as aforesaid; whenever the contractor shall become a postmaster, assistant postmaster, or member of Congress; and whenever, in the opinion of the Postmaster General, the service cannot be safely performed, the revenues collected, or the laws maintained.

And it is further stipulated and agreed, that such annulment shall not impair the right of the United States to claim damages from said contractor and his sureties under this contract; but such damages may, for the purpose of set-off or counterclaim, in the settlement of any claim of said contractor or his sureties against the United States, whether arising under this contract or otherwise, be assessed and liquidated by the auditor of the Treasury for the Postoffice Department.

And it is hereby further stipulated and agreed by the said contractor and his sureties that this contract may, in the discretion of the Postmaster General, be continued in force beyond its express terms for a period not exceeding

six months, until a new contract with the same or another contractor shall be made by the Postmaster General.

And it is further stipulated, that no member of, or delegate to, Congress shall be admitted to any share or part of this contract, or to any benefit to arise therefrom.

And this contract is further to be subject to all the conditions imposed by law, and the several acts of Congress relating to postoffices and post roads.

In witness whereof, the said Postmaster General has caused the seal of the Postoffice Department to be hereto affixed, and has caused the same to be attested by the signature of the Second Assistant Postmaster General, in accordance with the act of Congress approved March 3, 1877 (Sec. 3, 19, Stats., p. 335), and the said contractor and his sureties have hereunto set their hands and seals the day and year set opposite their names respectively.

By order of the Postmaster General:

S. A. WHITFIELD,
Second Assistant Postmaster General.

Signed, sealed, and delivered by the Second Assistant Postmaster General in the presence of J. E. McCabe.

Signed this 3d day of March, 1890.

And by the other parties hereto in the presence of

JAMES E. SMALL,
Witness as to Contractor.
MARION D. EGBERT,
A. F. MOORE,
Witnesses as to Sureties.

Signed this 10th day of January, 1890.

C. C. McCOY, [Seal]
Contractor.

Signed this 21st day of January, 1890.

W. O'DONNELL. [Seal]
THOMAS MOSGROVE. [Seal]
D. W. SMALL. [Seal]
Sureties.

Postoffice at Walla Walla, Wash.,
January 21st, 1890.

I hereby certify that I am acquainted with William O'Donnell, Thomas Mosgrove, and D. W. Small, all of Walla Walla, Washington, and the condition of their property, and that, after full investigation and inquiry, I am satisfied that they are good and sufficient sureties for the amount in the foregoing contract.

DANIEL STEWART,
Postmaster.

Certificate of the Oath of Mail Contractors and Carriers, Required by Act of Congress of March 5, 1874.
(Take this Oath after Signing the foregoing Contract.)

I, C. C. McCoy, being "employed in the care, custody, and conveyance of the mail" as Contractor on route No. 76,475, being Covered Regulation Wagon, Mail Messenger, Transfer and Mail Station Service at San Francisco, Cal., do solemnly swear that I will faithfully perform all the duties required of me, and abstain from everything forbidden by the laws in relation to the establishment of Postoffices and Post Roads within the United States; and that I will honestly and truly account for and pay over any money belonging to the said United States which may

come into my possession or control. And I also further swear that I will support the Constitution of the United States; So help me God.

C. C. McCOY, Contractor.

County of Washington, District of Columbia. } ss.

Sworn before the subscriber, M. D. Peck, a notary public for the county and State aforesaid, this 10th day of January, A. D. 1890, and I also certify that the person above named is above the age of twenty-one years, to the best of my knowledge and belief.

M. D. PECK, [Seal]
Notary Public.

Postoffice Department. Office of Second Assistant Postmaster General. Contract Division, Washington.

January 7, 1890.

Sir: The Postmaster General has accepted your proposal, under the advertisement of September 16, 1889, for carrying the United States mail from July 1, 1890, to June 30, 1894, on California route No. 76,475, between the postoffice at San Francisco, Cal., and the railroad depots, steamboat landings and mail stations, at $7,700 per annum, the service to be performed in covered regulation wagons, as prescribed in said advertisement. Contracts will be sent in due time to the postmaster at your place of residence, which you will please execute at once and file in the Department within thirty days from this date;

otherwise you will be declared a failing bidder and the service will be relet at your expense.

Very Respectfully,

S. A. WHITFIELD,

Second Assistant P. M. General.

Mr. C. C. McCoy, Walla Walla, Walla Walla Co., Wash.

Date, 1890, March 14th. State of California. No. of route, 76,475.

San Francisco Reg. Wagon Service. Contractor, C. C. McCoy. Pay $7,700.

Permit contractor to sublet.

JOHN WANAMAKER,

Postmaster General.

Date, 1890, April 8th. State of California. No. of route, 76,475.

San Francisco Covered Regulation Wagon Service. Contractor, C. C. McCoy. Pay, $7,700.

Recognize the subcontract of A. W. Branner of San Francisco, Cal., at $7,500 per annum, from July 1, 1890, to June 30, 1894.

JOHN WANAMAKER,

Postmaster General.

Date, 1890, October 28th. State of California. No. of route, 76,475.

San Francisco, California. Contractor, C. C. McCoy. Pay, $7,700. Subcontractor, A. W. Branner. Pay, $7,500.

From November 10, 1890, require contractor to perform

additional service as follows: Between main postoffice and Station F 2.60 miles, five round trips daily except Sunday, and two round trips Sunday. Between main postoffice and Station H, 2.65 miles, five round trips daily except Sunday and two round trips Sunday. Between main postoffice and Station J, .62 miles, five round trips daily except Sunday and two round trips Sunday. Also from December 1, 1890, between main postoffice and Station G, 3.12 miles, five round trips daily except Sunday and two round trips Sunday, without additional compensation, being in accordance with terms of his contract.

JOHN WANAMAKER,
Postmaster General.

Date, 1891, January 3d. State of California. No. of route, 76,475.

Covered Regulation Wagon Service, San Francisco, Cal. Contractor, C. C. McCoy, Pay, $7,700.

1. Terminate recognition of subcontract of A. W. Branner from November 30, 1890.

2. Recognize the subcontract of N. Wines, of San Francisco, California, at $9,900 per annum, from December 1, 1890, to November 30, 1891.

JOHN WANAMAKER,
Postmaster General.

Date, 1891, February 6th. State of California. No. of route, 76,475.

San Francisco, California. Contractor, C. C. McCoy. Pay, $7,700. Subcontractor, N. Wines. Pay, $9,900.

From February 16, 1891, require contractor to perform additional service as follows: Between main postoffice and Station E, 1.61 miles, eight round trips daily except Sunday and one round trip on Sunday, without additional compensation, being in accordance with the terms of his contract.

JOHN WANAMAKER,
Postmaster General.

ss.

State of California. No. 76,475.

Regulation Wagon Service, San Francisco, San Francisco County. Contractor, C. C. McCoy. Pay $7,700. Subcontractor, N. Wines. Pay, $9,900.

From October 1, 1891, require contractor to supply Substation K on the trips between the main office and Substation B, five (5) times a day except Sunday, (or more frequently if necessary) without increase of distance or pay, in accordance with the terms of his contract.

JOHN WANAMAKER,
Postmaster General.

Date, September 29, 1891.

[Telegram.]

San Francisco, Cal., May 3, 1893.

Hon. J. Lowrie Bell, Second Assistant Postmaster General, Washington, D. C.:

H. Floyd of this city has secured judgment against C. C. McCoy, contractor, route seventy-six four seventy-five, San Francisco Regulation Wagon Service, for $4,300. Outfit will be sold by sheriff to satisfy judgment, on May 5th. No other regulation wagons are available, and contractor will probably be unable to perform service in present wagons. Is this a mail messenger service or a star route? Instruct me what arrangements to make for temporary service if necessary.

SAMUEL M. BACKUS,
Postmaster.

[Telegram.]

San Francisco, Cal., May 8, 1893.

Second Assistant P. M. General, Washington, D. C.:

Service absolutely abandoned this date. Have arranged with Gorman for temporary service in regulation wagons at rate of seventeen thousand five hundred per annum, dating from May 5th. Department has privilege to terminate at any day. Particulars mailed.

BACKUS, Postmaster.

Postoffice Department. Office of Second Assistant Postmaster General, Contract Division, Washington.

May 9, 1893.

Sir: You are informed that the postmaster at San Francisco, Cal., advises this office that your equipment on

Route No. 76,475, Covered Regulation Wagon Service at San Francisco, Cal., was sold on the 5th instant at sheriff's sale to J. M. Gorman, and that service in your behalf has been abandoned.

The postmaster has been authorized to employ temporary service pending the resumption of service by you, at $17,500 per annum.

You are hereby notified that unless you promptly put this service into operation you will be declared a failing contractor, the service will be relet at your expense, and you and your sureties held subject to the penalties prescribed by law.

Notify this office at once of your intentions relative to this service.

Very respectfully,

J. LOWRIE BELL,

Second Assistant P. M. General.

Mr. C. C. McCoy, care Zevely & Finley, Washington, D. C.

Postoffice Department. Office of Second Assistant Postmaster General. Contract Division, Washington.

May 17, 1893.

Sir: You are informed that as you have failed to perform service on Route 76,475, Covered Regulation Wagon Service at San Francisco, Cal., an order has this day been made declaring you a failing contractor.

Very respectfully,

J. LOWRIE BELL,

Second Assistant P. M. General.

Mr. C. C. McCoy, care Zevely & Finley, Washington, D. C.

[Telegram.]

Postoffice Department, office of the Second Assistant Postmaster General.

Washington, D. C., May 17, 1893.

To W. O'Donnell, Thos. Mosgrove, D. W. Small, Walla Walla, Wash.:

C. C. McCoy has failed to perform Regulation Wagon Service in San Francisco in accordance with contract on which you are sureties. Will you assume service? Otherwise service will be relet at expense of contractor and sureties. Telegraph reply.

BELL, Second Assistant Postmaster General.

Postoffice Department. Office of Second Assistant Postmaster General. Contract Division, Washington.

May 17, 1893.

Sir: Referring to your letter of the 8th instant relative to the employment of temporary service on Route 76,475, Covered Regulation Wagon Service at San Francisco, Cal., you are informed that your action in employing this service is approved and you will continue it until the contractor has resumed service or until you are otherwise ordered by this office.

The Department cannot recognize this service from a date prior to May 6, 1893, as there is no way by which it can pay separate parties for part of a day's service.

Very respectfully,

J. LOWRIE BELL,

Second Assistant P. M. General.

Postmaster, San Francisco, Cal.

State of California. No. 76,475.

Regulation Wagon Service, San Francisco, San Francisco County. Contractor, C. C. McCoy. Pay, $7,700.00.

Whereas, C. C. McCoy, contractor on this route under the advertisement of September 16, 1889, has failed to perform the service he is hereby declared a failing contractor.

W. S. BISSELL,
Postmaster General.

Date, May 18, 1893.

[Telegram.]

Portland, Ore., May 19, 1893.

Hon. J. Lewis Bell, Second Assistant P. M. General, Washington, D. C.

Impossible for us to perform McCoy's wagon service at San Francisco and demand to be released as to future on all McCoy's bonds on which my name appears as surety. My name improperly secured. Letter by mail.

W. O'DONNELL.

State of California. No. 76,475.

Regulation Wagon Service, San Francisco, San Francisco County. Failing contractor, C. C. McCoy. Pay, $7,700.00.

C. C. McCoy having been declared a failing contractor and proposals for service for the remainder of the contract term having been invited, it is hereby ordered that the contract for the performance of the service from August 14, 1893, to June 30, 1894, be, and the same is hereby awarded to Max Popper of San Francisco, Cal., at the

rate of $12,000.00 per annum, being the lowest bid received.

W. S. BISSELL,
Postmaster General.

Date, June 16, 1893.

State of California. No. 76,475.

Regulation Wagon Service, San Francisco, San Francisco County. Contractor, Max Popper. Pay $12,000.

Modify order No. 14,712, of July 11, 1893, so as to state address of J. M. Gorman at San Francisco, Cal.

F. H. JONES,
Acting Postmaster General,

Date, July 19, 1893.

State of California. No. 76,475.

Regulation Wagon Service, San Francisco, San Francisco County. Contractor, Max Popper. Pay, $12,000.00.

Pay J. N. Gorman of San Francisco, Cal., at the rate of $17,500.00 per annum for temporary service from July 1, to August 13, 1893, subject to fines and deductions and charge to C. C. McCoy, failing contractor.

W. S. BISSELL,
Postmaster General.

Date, August 29, 1893.

State of California. No. 76,475.

Regulation Wagon Service, San Francisco, San Francisco County. Contractor, Max Popper. Pay, $12,000.00.

Pay J. M. Gorman at the rate of $17,500.00 per annum for temporary service from May 5, to June 30, 1893, sub-

ject to fines and deductions and charge to C. C. McCoy failing contractor.

Acting Postmaster General,

F. H. JONES,

Order No. 14,712. Date, July 11, 1893.

CONTRACTOR'S BOND.

UNITED STATES OF AMERICA.

San Francisco, San Francisco County, California.

Covered Regulation Wagon Mail Messenger, Transfer, and Mail Station Service in the City of San Francisco, Cal.

No. 76,475. $12,0000 per annum.

This Article of Contract, made the 16th day of June, eighteen hundred and ninety-three, between the United States of America (acting in this behalf by the Postmaster General) and Max Popper, Contractor, and Henry M. Black, of San Francisco, Cal., and J. L. Franklin, of San Francisco, Cal., as his sureties:

Witnesseth, That whereas Max Popper has been accepted as contractor for transporting the mails on route No. 76,475, being the Covered Regulation Wagon Mail Messenger, Transfer, and Mail Station Service at the city of San Francisco, Cal., under an advertisement issued by the Postmaster General on the 18th day of May, 1893, for such service, and which advertisement is herewith referred to and made by such reference a part of this contract, and all new or additional service of said kinds which may at any time during the term of this contract be required in said city at twelve thousand dollars per year,

for and during the term beginning the 14th day of August, 1893, and ending June 30, 1894.

Now, therefore, the said contractor and his sureties do, jointly and severally, undertake, covenant, and agree with the United States of America, and do bind themselves—

First. To carry said mail, using therefore wagons of the kind hereinafter described in sufficient number to transport the whole of said mail, whatever may be its size, weight, or increase during the term of this contract, and within the time fixed in the pamphlet advertisement of the Postmaster General dated September 16, 1889; and to carry until said schedule is altered by the authority of the Postmaster General dated September 16, 1889; and so to carry according to such altered schedule; to carry said mails in a safe and secure manner, free from wet and other injury, in substantial one or two-horse wagons of sufficient capacity for the entire mail; the wagons to be employed in the performance of the service to be built with closed bodies, paneled from bed or sill to the height of an ordinary wagon-body; above to be built of plain wood, panel set off with moulding, lined with canvas, with curved roof; the rear shall open below by gate, to drop to a level with the floor of the wagon, to fasten by means of a catch when shut; above by door-hinges or spring-hinges, so arranged that it shall shut tight against the gate and lock. The double wagons in all cases, and the single wagons whenever the proper performance of the service requires it, shall have double doors in the side, extending from the paneled frame of the body to the drip

of the roof; these doors shall be hung on spring-hinges; the locks and hinges to be used on the doors of all wagons shall be of the same make and pattern as is on exhibition on the sample door in the office of the Second Assistant Postmaster General, at Washington, D. C. On the front shall be a seat for the driver, with foot-board, trimmed and finished in leather. The wagons shall be kept painted and varnished in a thorough manner, and ornamented according to specifications, and shall be frequently washed and kept clean, and at all times be kept in good order and appearance. The painting, as to colors, ornaments, and design, both on running-gear and body, shall conform to the painting and ornamenting shown in the colored drawings on exhibition at the office of the Second Assistant Postmaster General, at Washington, D. C. The bodies of such wagons shall be made to conform to the lithographic drawings of the side and rear elevations of both single and double wagons hereto appended and made part of this contract, giving scale of dimensions. In case it is desired to increase or decrease the size of said wagons, such increase or decrease shall be made in exact proportion as to height and length, the Postmaster General reserving the right to vary, at any time, when in his judgment the service may require it, the plan or form of wagon to be used in the service.

Second. To take the mail from, and deliver it into, the postoffice, mail stations, and cars at such points, and at such hours, under the directions of the Postmaster at San Francisco, Cal., approved by the Postmaster General, as will secure dispatches and connections and facilitate

distribution, and at the contractor's expense for tolls and ferriage.

Third. To furnish the number of regulation wagons that, in the opinion of the Postmaster at San Francisco, Cal., will be sufficient for the prompt and proper performance of the service, including extra wagons to take the place of those that may be temporarily unserviceable, delayed waiting for trains, or withdrawn from service for repairs.

Fourth. To be accountable and answerable in damages to the United States, or any person aggrieved, for the faithful performance by the said contractor of all the duties and obligations herein assumed, or which are now or may hereafter be imposed upon him by law in this behalf; and, further, to be so answerable and accountable in damages for the careful and faithful conduct of the person or persons who may be employed by said contractor and to whom the said contractor shall commit the care and transportation of the mails, and for the faithful performance of the duties which are or may be by law imposed upon such person or persons in the care and transportation of said mails; and, further, that said contractor shall not commit the care and transportation of the mail to any person under sixteen years of age, nor to any person not of good moral character, or who has not taken the oath prescribed by law, or who cannot read and write the English language. Each driver shall wear when on duty the prescribed cap or hat described in the pamphlet advertisement of September 16, 1889.

Fifth. To discharge any driver, or other person employed in performing mail service, whenever required by

the Postmaster General so to do; not to transmit by themselves or any of them, or any of their agents, or be concerned in transmitting, commercial intelligence more rapidly than by mail; not to carry, otherwise than in the mail, letters, packets, or newspapers which should go by mail.

Sixth. To account for and pay over any money belonging to the United States which may come into the possession of the contractor, his sureties or employees.

Seventh. That foreign mails in transit across the territory of the United States shall, within the meaning of this contract, be deemed and taken to be mails of the United States.

Eighth. To carry postoffice blanks, mail-locks and mail-bags, and all other postal supplies.

Ninth. To convey, whenever requested so to do, one railway postoffice clerk, a substitute, or a messenger, on the driver's seat of each wagon.

Tenth. To perform all new or additional or changed covered regulation wagon, mail messenger, transfer, and mail station service that the Postmaster General may order at the city of San Francisco, Cal., during the contract term, without additional compensation, whether caused by change of location of postoffice, stations, landing, or the establishment of others than those existing at the date hereof, or rendered necessary, in the judgment of the Postmaster General, for any cause, and to furnish such advance wagons or extra wagons from time to time for special or advance trips as the Postmaster General may require, as a part of such new or additional service.

For which service, when properly performed, and the

evidence thereof shall have been filed in the office of the Second Assistant Postmaster General, the said Max Popper, contractor, is to be paid by the United States the sum of twelve thousand dollars a year, to wit: Quarterly, in the months of November, February, May, and August, through the Postmaster at the city of San Francisco, Cal., or otherwise, at the option of the Postmaster General; said pay to be subject, however, to be reduced or discontinued by the Postmaster General, as hereinafter stipulated, or to be suspended and withheld in case of delinquency.

It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster General may change the schedule and termini of the route, vary the routes, increase, decrease, or extend the service thereon, without change of pay; and that the Postmaster General may discontinue the entire service whenever the public interest, in his judgment, shall require such discontinuance; but for a total discontinuance of service the contractor shall be allowed one month's extra pay as full indemnity.

And it is further stipulated and agreed that for a failure to deliver not beyond the control of the contractor, or for any delay or interference with the prompt delivery of the mail at the postoffice, mail stations, depots, and landings, or for carrying the mail in a manner different or inferior to that hereinbefore specified; for suffering the mail to be wet, injured, lost or destroyed; or for any other delinquency or omission of duty under this contract; for all or any of which the contractor shall forfeit, and there

may be withheld from his pay such sum as the Postmaster General may impose as fines or deductions, according to the nature and frequency of the failure or delinquency.

And it is further stipulated and agreed that the Postmaster General may annul this contract for repeated failures; for violating the postal laws; for disobeying the instructions of the Postoffice Department; for refusing to discharge a carrier or any other person employed in the performance of service, when required by the Department; for transmitting commercial intelligence or matter that should go by mail, contrary to the stipulations herein; for transporting persons so engaged as aforesaid; whenever the contractor shall become a postmaster, assistant postmaster, or member of Congress; and whenever, in the opinion of the Postmaster General, the service cannot be safely performed, the revenues collected, or the laws maintained.

And it is further stipulated and agreed that such annulment shall not impair the right of the United States to claim damages from said contractor and his sureties under this contract; but such damages may, for the purpose of setoff or counterclaim, in the settlement of any claim of said contractor or his sureties against the United States, whether arising under this contract or otherwise, be assessed and liquidated by the auditor of the Treasury for the Postoffice Department.

And it is hereby further stipulated and agreed by the said contractor and his sureties that this contract may, in the discretion of the Postmaster General, be continued in force beyond its express terms for a period not exceed-

ing six months, until a new contract with the same or another contractor shall be made by the Postmaster General.

And it is further stipulated that no member of, or delegate to, Congress shall be admitted to any share or part of this contract, or to any benefit to arise therefrom.

And this contract is further to be subject to all the conditions imposed by law, and the several acts of Congress relating to postoffices and post roads.

In witness whereof, the said Postmaster General has caused the seal of the Postoffice Department to be hereto affixed, and has caused the same to be attested by the signature of the Second Assistant Postmaster General, in accordance with the act of Congress approved March 3, 1877 (Sec. 3, 19 Stats., p. 335), and the said contractor and his sureties have hereunto set their hands and seals the day and year set opposite their names respectively.

By order of the Postmaster General:

J. LOWRIE BELL,
Second Assistant Postmaster General.

Signed, sealed, and delivered by the Second Assistant Postmaster General in the presence of J. E. McCabe.

Signed this 22d day of August, 1893.

And by the other parties hereto in the presence of

W. S. BOYCE.
JOHN P. DEVEREUX.

Signed this 22d day of July, 1893.

MAX POPPER. [Seal]
Contractor.

Signed this 22d day of July, 1893.

HENRY M. BLACK. [Seal]
J. L. FRANKLIN. [Seal]
Sureties.

Postoffice at San Francisco, Cal.
July 25th, 1893.

I hereby certify that I am acquainted with Henry M. Black, of San Francisco, Cal., and J. L. Franklin, of San Francisco, Cal., and the condition of their property, and that, after full investigation and inquiry, I am satisfied that they are good and sufficient sureties for the amount in the foregoing contract.

SAMUEL W. BACKUS,
Postmaster.

Certificate of the Oath of Mail Contractors and Carriers, Required by Act of Congress of March 3, 1874.
(Take this Oath after signing the foregoing Contract.)

I, Max Popper, being "employed in the care, custody, and conveyance of the mail" as Contractor on route No. 76,475, being Covered Regulation Wagon, Mail Messenger, Transfer and Mail Station Service at San Francisco, Cal., do solemnly swear that I will faithfully perform all the duties required of me, and abstain from everything forbidden by the laws in relation to the establishment of postoffices and post roads within the United States; and that I will honestly and truly account for and pay over any money belonging to the said United States which may come into my possession or control. And I also

further swear that I will support the Constitution of the United States: So help me God.

MAX POPPER,
Contractor.

City and County of San Francisco, } ss.
State of California.

Sworn before the subscriber, postmaster for the city and county and State aforesaid, this 25th day of July, A. D. 1893, and I also certify that the person above named is above the age of twenty-one years, to the best of my knowledge and belief.

SAMUEL W. BACKUS. [Seal]

BOND.

DIRECTIONS:—Insert the names of the principal and sureties in full in the body of the Bond; also the date. The signatures to the Bond should be witnessed, and the amounts set opposite each name in the jurat.

Know all men by these presents, that Max Popper, of San Francisco, in the State of California, principal, and Henry M. Black, of San Francisco, and Julius L. Franklin, of San Francisco, in the State of California, as sureties, are held and firmly bound unto the United States of America in the just and full sum of thirty thousand dollars, lawful money of the United States, to be paid to the said United States of America, or its duly appointed or authorized officer or officers; to the payment of which, well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this twenty-second day of July, 1893.

Whereas, C. C. McCoy, contractor on Route No. 76,475, under advertisement of September 16th, 1889, has failed and refused to perform the service according to his contract, and the Postmaster General has awarded the contract for the performance of the service on said Route No. 76,475, for the remaining part of the said term, to the above-named Max Popper, who has consented to enter into contract, and give bond, with sureties to be approved by the Postmaster General, for the faithful performance thereof. And whereas, also, the said Max Popper, in pursuance of the said award of the Postmaster General, has executed the aforegoing contract, and now executes this bond in accordance with the provisions of the act of Congress approved June 23, 1874, entitled "An act making appropriations for the service of the Postoffice Department for the fiscal year ending June 30, 1875, and for other purposes."

Now, the condition of the above obligation is such that if the above-bounden Max Popper shall justly perform the service as he has contracted to do in the foregoing contract, then this obligation shall be void; but if the said Max Popper shall fail or refuse to perform the service according to his said contract, then and in that case the said bond shall be of full force and obligation in law, and he and his sureties shall be liable for the amount of his said bond as liquidated damages, to be recovered in action of debt on his said bond.

In witness whereof, we have hereunto set our hands and seals this 22d day of July, 1893.

MAX POPPER. [Seal]
HENRY M. BLACK. [Seal]
J. L. FRANKLIN. [Seal]

Witness as to Henry M. Black and J. L. Franklin:
S. J. LEVY.

INTERROGATORIES.

The following interrogatories are prescribed by the Postmaster General, to be answered, under oath, by each of the sureties in the aforegoing Bond:

1. What amount in value of real estate is owned by you?

2. Of what description—town or city lots, improved or unimproved, or farming land, cultivated or uncultivated?

3. Where is it situated, and in what county and State does record evidence of your title exist? (Answer fully on this page.)

OATH OF SURETIES.

State of California,
County of San Francisco. } ss.

On this twenty-second day of July, 1893, personally appeared before me Henry M. Black and J. L. Franklin, sureties in the aforegoing bond, to me known to be the persons named in said bond as sureties, and who have executed the same as such, who being by me duly sworn, depose and say, each for himself deposes and says, he has executed the within bond; that his place of residence is correctly stated therein; that he is the owner of real es-

tate worth the sum hereinafter set against his name over and above all debts due and owing by him, and all judgments, mortgages, and executions against him after allowing all exemptions of every character whatever, the total sum thus assured amounting to ($60,000) sixty thousand dollars, being double the amount of the aforegoing bond.

And in answer to the aforegoing interrogatories, each of the said sureties further deposes and says that the value, description, and location of his real estate is as follows:

Names of Sureties.	Value of Real Estate. (As required by Interrogatory No. 1.)	Description of Real Estate. (As required by interrogatory No. 2.)	Where Located, Recorded Evidence of Title (As required by Interrogatory No. 3.)
Henry M. Black	$20,000	Lot and improvements, 95x117, bet. Fulton and McAllister Sts.	City of San Francisco, San Francisco County, Cal.
	12,000	S. W. cor. Pye and Broderick Sts., lot and improvements.	City of San Francisco, San Francisco County, Cal.
J. L. Franklin.	15,000	House and lot, 1328 Hayes St., bet. Devisadero and Broderick Sts., 25x137.6.	City of San Francisco, San Francisco County, Cal.
	35,000	Lot and improvements, W. S. Fillmore, bet. Sutter and Bush Sts., 50x 00.	City of San Francisco, San Francisco County, Cal.
		No incumbrance on either of above.	

HENRY M. BLACK.

J. L. FRANKLIN.

Subscribed and sworn before me this twenty-second day of July, 1893.

[Seal] SOL. J. LEVY,

Notary Public in and for the City and County of San Francisco, State of California.

CERTIFICATE OF POSTMASTER.

I, the undersigned, postmaster at San Francisco, State of California, after the exercise of due diligence to inform myself of the pecuniary ability and responsibility of the

principal and his sureties in the foregoing bond, and of the value of the real estate owned by them, respectively, over and above all liens and encumbrances, do hereby approve said bond, and certify that the said sureties are sufficient to insure the payment of double the entire amount of said bond; and I do further certify that the said bond was duly signed by Max Popper and Henry M. Black and J. L. Franklin, his sureties, before signing this certificate.

SAMUEL W. BACKUS,
Postmaster.

Dated July 25th, 1893.

State of California. Route No. 76,475. Year 1893. July 1st to August 14th.

Mail Messenger Service, San Francisco. Contractor, C. C. McCoy. Pay, $7,700. July 5, 1893, eleven pouches for S. F. & S. C. R. P. O. were returned to P. O. instead of dispatched; delay sixteen hours.

Fine, $5.00.

W. S. BISSELL,
Postmaster General.

Date of case, August 30, 1893.

[Endorsed]: 137 C. C. Plf's Ex. "A." November 14, 1899. No. 599. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit "A." Received March 26, 1900. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk

Defendants object to the certificate to account for the amount of actual damages, as follows:

Defendants object to the first item stated in said account, to wit, the amount paid J. M. Gorman for temporary services from May 5th to August 13th, 1893, $4,827.77, for the reason that the same is not competent or material, and for the further reason that it does not appear that said assessment of damages shown by said item is properly made up.

Defendants object to the third item shown in said account, for the reason that the same is not competent or material, and it appears that the damages shown by said item are improperly assessed.

Defendants are willing to admit so much of said account as is shown in the second item, to wit, the amount of fine, third quarter, 1893, $5.00, as competent evidence against the defendants in this cause.

Defendants object to the admission of the copy from the Treasury Department headed, "Certificate to Evidence of Demand," for the reason that the same is not competent, material, or relevant.

Defendants object to the admission of the copy of the telegram dated May 3d, 1893, and the copy of telegram dated May 8th, 1893, for the reason that the same, and each of them, are incompetent and immaterial, and it appears that neither of the same is the best evidence of the contents thereof; the same purporting to be copies of copies, and not the originals in the office of the Treasurer for the Postoffice Department.

Defendants object to the admission of the copy of the letter to C. C. McCoy, dated May 9th, 1893, for the reason

BOTT,
OVOCATE

REMANDS CASE FOR NEW TRIAL

United States Supreme Court Reverses Decision in Case Against a Mail Contractor.

WASHINGTON, April 4. — The United States Supreme Court to-day decided in favor of the Government in the case of the United States vs. C. C. McCoy and others, appealed from the Circuit Court of Appeals for the Ninth circuit. McCoy entered into a contract to transport the mails in San Francisco for four years at $770 per year. After carrying on the work for three years, personally and by subcontractors, the Postmaster called upon McCoy for additional service, without extra compensation, according to his contract. McCoy refused, and abandoned his contract. The Postmaster thereupon wired to Washington, and received permision to employ a temporary service at $17,500 per annum pending the resumption of the service by McCoy.

The United States entered suit against McCoy and his bondsmen for the difference between the sum due him and the extra cost of the service. McCoy and his bondsmen entered a general denial, and the Circuit Court ordered judgment in his favor because of the insufficiency of the Government's evidence to make out a prima facie case. The chief reason was that the exhibits of telegrams between the department and the Postmaster were copies of copies, and not even copies of the original papers.

Another trial was held with the same result and the Circuit Court of Appeals affirmed the judgment. The Supreme Court to-day reversed this judgment and remanded the case for trial, holding that so long as McCoy made no objection to the copies of the copies of telegrams they were admissible as evidence.

that the same is not competent or material, and for the further reason that it has not been proved that said letter was delivered to C. C. McCoy, or directed to the address of C. C. McCoy.

Defendants object to the admission of the letter to C. C. McCoy, dated May 17th, 1893, for the reason stated above, in last objection.

Defendants object to the admission of the telegram to William O'Donnell, Thomas Mosgrove, D. W. Small, dated May 17th, 1893, for the reason that the same is not competent or material.

Defendants object to the admission of the copy of telegram dated May 19th, 1893, signed William O'Donnell, for the reason that the same is not competent or material to prove any liability against these defendants, and it appears that said copy is not a copy of any original paper in the office of the auditor for the Postoffice Department.

Defendants object to the admission of the letter dated August 29th, 1893, signed W. S. Bissell, Postmaster General, for the reason that the same is not competent or material to prove any liability on the part of any of the defendants herein.

It having been stipulated in open court between counsel that the copies contained in said transcript of the advertisement of September 16th, 1889, and the proposal and bond purporting to be signed by C. C. McCoy, David W. Small and William O'Donnell, and the contract and bond signed by C. C. McCoy, D. W. Small, William O'Donnell, and Thomas Mosgrove, and the contract and bond signed by Max Popper, Henry W. Black and J. L. Frank-

lin, were true copies of the originals of such instruments, and the said proposal and bond signed by C. C. McCoy, David W. Small and William O'Donnell, and the said contract and bond signed by C. C. McCoy, David W. Small, William O'Donnell and Thomas Mosgrove, were signed and executed by these defendants; and said copies were admitted in evidence without objection.

The plaintiff then rested its case. The defendants announcing that they had no evidence to introduce, plaintiff requested of the Court the following instruction:

"Gentlemen of the jury, the plaintiff having made out a prima facie case herein by competent evidence, showing the defendants to be indebted to the plaintiff in the sum of $5,772.99 and interest thereon at the rate of six per cent per annum from the 1st day of March, 1895, and the defendants not having introduced any evidence whatever to answer or explain the case made out and evidence introduced by the plaintiff, the Court instructs you to return a verdict in favor of the plaintiff and against the defendants, and each of them, for the sum of $5,772.99 and interest thereon at the rate of six per cent per annum from the 1st day of March, 1895."

Which said instruction the Court then and there refused to give, and in refusing to give the same, endorsed thereon the following:

"Refused exception allowed."

To which refusal of the Court to give said instruction the plaintiff duly excepted and its exception was allowed.

Whereupon the Court, at the request of the defendants, instructed the jury as follows:

"Gentlemen of the jury, it will not be necessary for you to retire to consider this case. You can render a verdict from your seats. This is an action in which the Government sued to recover damages for breach of a mail contractor's bond—breach of the contract. The action is against the contractor and the sureties upon his bond. The Government claims damages for the total abandonment of the contract without having performed it, and as to that claim all the evidence that has been offered on the part of the Government is insufficient to prove that there was an abandonment, there being no testimony of any witness having knowledge of the fact that the contractor did fail. The evidence includes the statement of account made up by the Auditing Department of the Government, in which there appears to have been a fine of five dollars imposed upon the contractor for a particular failure, and in accordance with the decision of the Circuit Court of Appeals for this Circuit, that evidence is sufficient prima facie to entitle the Government to recover the five dollars, and the defendants here in open court have admitted liability for that five dollars. Therefore, your verdict will be in favor of the Government for the sum of five dollars. I have prepared a verdict which you will select one of your number to sign as foreman, and that will be your verdict in the case."

To which instruction as given by the Court the plaintiff, by Edward E. Cushman, Assistant United States Attorney, took its exception as follows:

"Comes now the plaintiff, before the rendition of said verdict, and excepts to the instruction of the Court to the

jury to return such verdict, and excepts to the ruling of the Court in its instruction to the jury that the plaintiff had failed to take out a prima facie case, and that it was necessary for the plaintiff, in order to make out a prima facie case to show other than had been shown by the evidence offered by it, the abandonment and failure on the part of the defendant, C. C. McCoy, to carry and deliver the mails in the city of San Francisco, as he had agreed to do."

Which said exception as taken by the plaintiff was duly allowed.

I, C. H. Hanford, Judge of the above-entitled court, and the Judge who tried the above-entitled action, do hereby certify that the matters and proceedings embodied in the foregoing bill of exceptions, consisting of 68 pages, are matters and proceedings occurring in the said cause, and that the same are hereby made a part of the record therein. I further certify that same contains all of the material facts, matters and proceedings heretofore occurring in the cause and not already a part of the record therein.

C. H. HANFORD,
Judge.

[Endorsed]: Filed in the United States Circuit Court, District of Washington, May 11, 1901. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the United States Circuit Court for the District of Washington, Southern Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs. No. 137.

C. C. McCOY et al.,
Defendants.

Praecipe for Transcript.

To the Clerk of the Above-entitled Court:

You will please include in the record in the above-entitled cause, to be prepared, certified, and sent to the Court of Appeals, of the records and files therein, the following:

Amended complaint; answer; trial record, first trial; order for entry of judgment, first trial; order granting motion for nonsuit, first trial; assignment of error on first appeal; writ of error on first appeal; mandate; opinion of Court of Appeals; trial record, last trial; motion for new trial; order denying motion for new trial; judgment and exceptions thereto; petition for writ of error; assignments of error; order allowing writ of error; writ of error; citation; bill of exceptions and statement of facts.

EDWARD E. CUSHMAN,
Assistant United States Attorney.

[Endorsed]: Filed in the United States Circuit Court, District of Washington. May 25th, 1901. A. Reeves Ayres, Clerk. By H. B. Strong, Deputy.

In the Circuit Court of the United States, for the District of Washington, Southern Division.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

CHRISTOPHER C. McCOY, DAVID W. SMALL, WILLIAM O'DONNELL, and THOMAS MOSGROVE, Defendants.

No. 137.

United States of America, District of Washington. } ss.

Clerk's Certificate to Transcript.

I, A. Reeves Ayres, Clerk of the Circuit Court of the United States for the District of Washington, do hereby certify, the foregoing one hundred and four (104) pages, numbered from one (1) to one hundred and four (104), inclusive, to be a full, true, and correct copy of the record and proceedings had in the above-entitled cause, as the same remains on file and of record in the office of the clerk of the Circuit Court of the United States for the District of Washington, at Walla Walla, Washington, in the Southern Division of said District, and that the foregoing pages, constitute the transcript of the record on appeal in the above-entitled cause from the Circuit Court of the United States for the District of Washington, Southern Division, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and the return to the annexed writ of error filed in my office on the 11th day of May, 1901.

I further certify that I hereto annex and herewith transmit the original citation issued in said cause and the original writ of error issued in said cause.

I further certify that the cost of preparing and certifying the foregoing transcript on appeal, and return to writ of error, is the sum of $36.70 and that the same is chargeable to the United States, and will be included in my account for clerk's fees against the United States for the quarter ending June 30th, 1901.

In witness whereof I have hereunto set my hand and the seal of said Circuit Court, this 3d day of June, 1901.

[Seal] A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the District of Washington.

By H. B. Strong,
Deputy Clerk.

[Ten Cent U. S. Int. Rev. Stamp Canceled.]

In the United States Circuit Court for the District of Washington, Southern Division.

UNITED STATES OF AMERICA, Plaintiff,
vs. No. 137.
C. C. McCOY et al, Defendants.

Writ of Error.

United States of America—ss.

The President of the United States of America, to the Honorable Judges of the Circuit Court of the United States for the District of Washington, Ninth Judicial Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment and order denying motion for a new trial in the above-entitled cause and action, which is in the said Circuit Court before you or some of you, between the United States of America, plaintiff, and C. C. McCoy, David W. Small, William O'Donnell and Thomas Mosgrove, defendants, a manifest error hath happened, to the great damage of the United States of America, plaintiff, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given and said order therein made, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ that you have the same at the city of San Francisco, in the State of California, within thirty days from the 10th day of May, 1901, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 11th day of May, in the year of our Lord one thousand nine hundred and one, and of the independence of the United States the one hundred and twenty-fifth.

[Seal] A. REEVES AYRES,

Clerk of the Circuit Court of the United States for the District of Washington.

By R. M. Hopkins,

Deputy Clerk.

This writ hereby allowed this 11th day of May, 1901.

C. H. HANFORD,

U. S. District Judge, Presiding in said Circuit Court.

Due and full service of the foregoing writ of error acknowledged this 11th day of May, 1901.

W. T. DOVELL,

Attorney for Defendants.

[Endorsed]: No. 137. In the Circuit Court of the United States for the District of Washington. United States vs. C. C. McCoy et al. Writ of Error. Filed May 11, 1901. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the United States Circuit Court for the District of Washington, Southern Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

C. C. McCOY et al, Defendants.

No. 137.

Citation.

The President of the United States, Greeting, to C. C. McCoy, David W. Small, William O'Donnell, and Thomas Mosgrove:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals

for the Ninth Circuit to be holden at the city of San Francisco, in said Circuit, within thirty days from the 10th day of May, 1901 next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Washington, Southern Division, wherein the United States of America is plaintiff in error and you are the defendants in error, to show cause, if any there be, why the judgment rendered in favor of the plaintiff in error for the sum of five dollars and costs on the 11th day of May, 1901, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 11th day of May, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States of America the one hundred and twenty-fifth.

[Seal] C. H. HANFORD,

United States District Judge, Presiding in said Circuit Court

Due and full service of the above citation in behalf of appellees and defendants acknowledged this 11th day of May, 1901.

W. T. DOVELL,

Attorney for Appellees and Defendants.

[Endorsed]: No. 137. In the Circuit Court of the United States for the District of Washington. United States vs. C. C. McCoy et al. Citation. Filed May 11, 1901. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

[Endorsed]: No. 708. In the United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Plaintiff in Error, vs. C. C. McCoy, David W. Small, William O'Donnell, and Thomas Mosgrove, Defendants in Error. Transcript of Record. Upon Writ of Error to the Circuit Court of the United States for the District of Washington, Southern Division.

Filed June 10, 1901.

F. D. MONCKTON,

Clerk.

No. 708

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

C. C. McCOY, DAVID W. SMALL, WILLIAM O'DONNELL and THOMAS MOSGROVE,
Defendants in Error.

BRIEF FOR THE UNITED STATES.

Upon Writ of Error to the Circuit Court of the United States for the District of Washington, Southern Division.

WILSON R. GAY,
United States Attorney.

EDWARD E. CUSHMAN,
Assistant United States Attorney.

SHAW & BORDEN CO.

No. 708

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

C. C. McCOY, DAVID W. SMALL, WILLIAM O'DONNELL and THOMAS MOSGROVE,
Defendants in Error.

BRIEF FOR THE UNITED STATES.

Upon Writ of Error to the Circuit Court of the United States for the District of Washington, Southern Division.

WILSON R. GAY,
United States Attorney

EDWARD E. CUSHMAN,
Assistant United States Attorney

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STATEMENT.

This case has been before this Court as No. 599 and a decision rendered, in part sustaining and in part reversing the lower Court, which decision will be found in 104 Federal, page 669. (Record, p. 26.)

This is a suit by the United States as plaintiff against C. C. McCoy, as principal defendant, and his bondsmen, as co-defendants, for $5,772.99 and interest, actual damages alleged to have been sustained by the plaintiff on account of the failure of McCoy to perform a contract for the transportation of mail matter on Route No. 76,475.

The case came on for trial on the issues joined by plaintiff's amended complaint (page 1 Record), and a general denial by the defendants (page 17 Record)

The plaintiff put in evidence, in support of its case, the exhibits which appear in the Record, beginning at page 52, and to which more particular reference will be made hereafter, and rested.

The defendants moved for a non-suit "because of the legal insufficiency of plaintiff's evidence to make out a prima facie case," which motion was granted by the Court, and the plaintiff duly excepted (pages 19 and 20 Record), from which order and judgment of non-suit the former writ of error was sued out.

Thereafter, in this Court, on October 8th, 1900, a mandate and opinion (Transcript of Record, pages 24 and 26), were made, rendered and filed reversing the judgment of non-suit

entered below as regarding an item of five dollars on account of a fine for that amount imposed by the Postmaster General upon the defendant McCoy, and sustaining the lower Court as regards the greater amount for which the action was brought, that is, for damage resulting from the failure to perform his contract, this Court holding with the lower Court that the evidence introduced by the plaintiff in error below was legally insufficient to make out a prima facie case and to make out a breach of contract by the defendants or its abandonment by McCoy. The said cause was thereby remanded to the lower Court with instruction to take further action in accordance with the opinion of this Court. Thereafter, on the 9th day of May, 1901, the case came on regularly for trial in the lower Court (Transcript of Record, page 33), a jury was impaneled, and counsel for Plaintiff in Error moved for a continuance on account of the absence of a material witness (Transcript of Record, pages 33, 47 and 48), which motion was denied and exception taken by Plaintiff in Error and allowed by the Court, and the case proceeded to trial. Plaintiff introduced substantially the same evidence as upon the former trial (Transcript of Record, page 52 et seq.), and then rested its case. Defendants elected to put in no evidence, and the case was submitted, plaintiff requesting an instruction directing the jury to return a verdict for the full amount for which suit was brought, which instruction was refused, to which Plaintiff in Error took and was allowed an exception. (Transcript of Record, page 114.) Where upon the Court, at the request of the defendants, instructed the jury that plaintiff had introduced no evidence legally sufficient to justify a verdict against the defendants except as to the one item of the five dollar fine before mentioned, and

directed the jury to return a verdict for that amount, to which instruction the Plaintiff in Error then took and was allowed an exception. (Transcript of Record, pages 114 and 115.) In accordance with which instruction a verdict was so returned. (Transcript of Record, pages 33 and 34.) Thereafter, on May 10th, 1901, a notice and motion for a new trial was by the Plaintiff in Error served and filed. (Transcript of Record, pages 34 and 36.) Thereafter, on May 11, 1901, the said motion for a new trial was denied and judgment rendered upon and in accordance with the verdict, to which the Plaintiff in Error took and was allowed an exception. (Transcript of Record, pages 36 to 38.) Thereafter Plaintiff in Error duly sued out and perfected a writ of error to this Court. (Transcript of Record, pages 38 to 46.) The said cause is now before this Court for hearing and argument upon the following

ASSIGNMENT OF ERRORS.

First. The Court erred in holding that the plaintiff was not entitled to a continuance upon the showing and affidavit made and filed by it for that purpose.

Second. The Court erred, upon the completion of the plaintiff's testimony, no testimony being introduced by the defendants, to give the instruction requested by plaintiff's counsel.

Third. The Court erred in giving the instruction requested by defendant's counsel, and in holding that the duly certified records, orders, balances, certificates, accounts and other papers and documents from the office of the auditor of the Postoffice Department in relation to said cause, as intro-

duced and admitted upon the trial thereof in behalf of the plaintiff, did not make out a prima facie case against the defendants and each of them.

Fourth. The Court erred in refusing to grant plaintiff's motion for a new trial.

Fifth. The Court erred in entering its judgment upon said verdict.

ARGUMENT.

I.

Regarding the first assignment of error, the Court erred in refusing the continuance asked by plaintiff on account of the absence of the witness T. J. Ford. (Transcript of Record, pages 47 to 52.)

Under the ruling of this Court and the lower Court, the testimony to be given by this witness was material and important. The defendants could hardly with grace complain at lack of diligence in being sued. The plaintiff made a showing of diligence and had done everything possible to secure the attendance of this witness at the trial. The Court was not justified in assuming that the witness would disobey a subpoena. There might be many reasons for preferring the attendance at the trial of this witness, in preference to taking his deposition, for in the latter method important rebutting testimony, the presence and necessity of which would develop upon the trial and could not be anticipated, might be lost.

II.

Regarding the second, third, fourth and fifth assignments of error, I will present my points upon those under one head, as they all go to the single question of the sufficiency of the testimony offered by the Plaintiff in Error to jusitfy an investigation of the case by the jury.

Though this question was presented to this Court on the former hearing, it was then done upon an appeal from an order and judgment of non-suit, and not a final judgment, and I now bring this matter before the Court upon an appeal from such final determination, in arriving at which the former rulings of the lower Court, as modified by the ruling and opinion of this Court on appeal therefrom, were adhered to and followed. In this presentation I shall attempt to answer and overcome the position taken by the Court, and the expressed reasons therefor, and reply to the brief of Defendant in Error on such former appeal.

And in doing this, as this Court simply decided that "a material allegation of the complaint was that on the 8th day of May, 1893, the said C. C. McCoy and the said sub-contractors did abandon said contract and did fail and refuse to perform the same, * * * the statement of McCoy's account by the Auditor of the Postoffice Department, * * * the certificate of the Postmaster General dated May 18th, 1893, declaring that McCoy had failed to perform the service and was a failing contractor, were all legally insufficient to establish the fact that McCoy had wholly abandoned the perform-

ance of his contract," without going into the matter of the precedents and reasons leading to that conclusion, I shall assume that they were the arguments used and authorities cited by the Defendant in Error upon that hearing.

In the United States vs. Case, 49 Federal, 270, cited and relied on by Defendants in Error, it was decided that accounts in the Postoffice Department, to support judgment, must have been made up by such officers in a ministerial and not a judicial capacity. Looking at the particular facts in that case, to understand the meaning of this general language and that quoted by the defendant, we find therein that "the officials of the Postoffice Department have charged the defendants *in gross* with 'commissions *illegally* claimed' and 'property *illegally* retained,' without a word of proof, so far as the account showed, to sustain the charges. These officials had tried the questions at issue between the department and the postmaster and found him guilty of *malfeasance*, assessed the damages against him, and certified their findings. The evidence, if there was any, on which these findings were based had not been returned. There is nothing to show what the property was that the postmaster is accused of retaining improperly, or its value, or the reasons which induced the officials of the department to make the charges relating thereto."

It can be readily comprehended that there is a vast difference between that case and the one at bar. In the case at bar the accounting officer who made the entries, kept and certified, as all entries are made in accounts in the ordinary routine, had to find that certain facts existed, of which he had no personal knowledge. He found that there had been a failure of

the contractor to perform, and charged him with the costs to the Government occasioned by that breach or failure. Was not this within the ordinary ministerial duties of such officer of the Postoffice Department as much, if not more so, than to determine that a postmaster in the Philippines has received certain stamps, supplies and property of the United States, or that he had sold them and not accounted for them? These would be everyday matters of bookkeeping, and yet as a matter of common knowledge we must know that none of the men keeping the accounts in Washington have or had personal knowledge of the transactions they enter in such books, and that all such bookkeeping is done by means of what Defendant in Error terms hearsay, but in the ordinary course of business and departmental routine.

In the United States vs. Case, the officials had made a *gross* charge for "commissions illegally claimed" and "property illegally retained." In the case at bar the claim is itemized and the postoffice officials have by the accounts ministerially evidenced certain facts. They haven't judicially undertaken, or judicially determined, that anything was legally or "illegally" done. It was this vice in the action of officials of the Postoffice Department, and their proneness to deduce legal conclusions involving malfeasance, and incidentally fraud, at which the ruling of the Court was aimed. Further, the case seems to have rested on the fact that the statute only authorized the "withholding" of commissions on false returns by the postmaster and did not authorize a *charge*, when the accounts had once in due course been settled and allowed.

The Government's contention in the case at bar is this: The same being a suit to recover a certain sum of money, that the

ultimate fact or issue is, are the defendants indebted in this amount to the United States, the effect of the settled account certified by the Sixth Auditor is not only sufficient to show the items and amounts, but the fact of debt itself. In United States vs. Stone, 106 U. S., 525, at page 530, it is said: "And a separate adjustment of his accounts for both periods made at the Treasury Department upon its books is prima facie evidence not only of the *fact* and the *amount* of the indebtedness, but also of the *time when* and the *manner* in which it arose.

The next case quoted and relied upon by Defendant in Error, United States vs. Fosyth, 6 McLean, 584, Federal Case No. 15,133, was a criminal case and contains a recognition, as I consider, of the distinction I have made above—that items and facts ascertained by the ordinary official action of the department (though the information acted on may involve hearsay), are, when certified, competent evidence when otherwise it would not be so. It was therein said:

"The transcript being offered in evidence was objected to on the ground that the items were not set down from the returns of the defendant, but were returned by his successor from talking with the persons who had paid duties into the office. The treasury transcript is made evidence when duly certified. There is no objection to the authentication of this document, but the items on which a considerable part of it is based, though put into the transcript, are not evidence. They were not ascertained and established *by the ordinary official action of the department*, and consequently they are not evidence. Many of the items were put down by an estimate, and others no better proof of their validity but hearsay, which is not admissible."

This quotation shows that the same fault was involved as in the case of United States vs. Case, supra. There was a gross charge, or worse still, a mere guess or estimate, and further, the charges and items were not made in the ordinary course at the time of the transaction, but made long after from talks held with private, not official, persons interested adversely to the party sought to be charged.

The next case cited and quoted by Defendant in Error is that of the United States against Buford, 3 Peters, page 12. That case was one where the Government was suing the defendant on a treasury statement made upon a receipt given to an officer named Morrison by the defendant and assigned by Morrison to the United States under a special Act of Congress. It was therein said:

"An account stated at the treasury department which does not arise in the ordinary mode of doing business in that department can derive no additional validity from being certified under an Act of Congress. Such a statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department where the transactions are shown by its books. In these cases the officers may well certify, for they must have official knowledge of the facts stated, but where moneys come into the hands of an individual, as in the case under consideration, the books of the treasury do not exhibit the facts, nor can they be official information to the officers of the department. In this case, therefore, the claim must be established, not by the treasury statement, but by the evidence on which that statement was made. The account against Buford is founded on a receipt and was made out on the day it was assigned to Morrison under a special Act

of Congress. Until this time *Morrison* was charged on the books of the treasury with this sum of ten thousand dollars, and there can be no doubt that he and his sureties were liable for it. As the advance of this sum to Buford was not made in pursuance of any authority, the treasury officers had no right to release Morrison from liability by crediting his account with so much money paid to Buford. The declaration being special upon a treasury account, and the account being raised upon the assignment of a receipt, the claim of the United States to the sum in controversy, as presented, cannot be considered as existing prior to the assignment."

It needs no argument to show that a treasury account growing out of the circumstances and acts surrounding a business transaction, to deal with which it had required a special Act of Congress, applying to private individuals, is not a transaction arising in the ordinary course of departmental business and routine, and the Court might well say that the department officers had no official knowledge of the facts, and that when they undertook to certify and determine them they were acting without the scope of their authority.

The next case quoted and relied upon by the Defendant in Error was that of the United States vs. Smith, 35 Federal, 490, which was a case where a certain *gross* charge contained in a treasury transcript was rejected as evidence:

"Among the various papers forming the transcript is a statement purporting to be a copy of Smith's 'consolidated account' as borne on the books of the treasury department. On the debit side of the account he is charged with the sum of $1,777.03 'for government property received at the Western

Shoshone Agency and not properly accounted for.' The transcript of the 'consolidated account' doesn't show of what the property consisted, nor the manner in which the value of the same was ascertained. * * * Respecting this latter paper it should also be said that it doesn't profess to be a transcript from any book kept, or a copy of any document on file, in the treasury department. * * * But a transcript from a book which merely shows a charge in gross against the officer for the value of public property, without describing the property or the method of valuation, or the manner in which it came to his hands, or the disposition made of the same, is of no value even under Section 886."

There is certainly nothing so far in that case that applies to the case at bar. It could hardly be said that a gross charge, such as the one in that case, that neither disclosed the items of which it is composed nor the value, was in any sense an "account" or "statement of account" as contemplated in Sections 886 or 889 R. S. But no such objection could be urged against the statement of account in this case, which is:

Statement of Account for Amount of Actual Damage.

Dr. *C. C. McCoy (Col.) Failing Contractor, in account with the United States,* Cr.

Route 76,475	To amount paid J. M. Gorman, for temporary service, from May 5, to August 13, 1883	$4,827 77	Route 76,475	By transportation from April 1, to August 13, 1893	$2,845 65
"	To amount of fine, 3d quarter, 1893	5 00		By balance	5,772 99
"	To difference between his contract at $7,700.00 and the contract of Max Popper, at $12,000.00 per annum, from August 14, 1893, to June 30, 1894	3,785 87			
		$8,618 64			$8,618 64
	To balance	$5,772 99			

This shows definitely what the items of charge are and the amounts of each, and certainly the drawing and paying of warrants for these items are matters within the official knowledge of the officer of the department charged with keeping these accounts.

In the case of the United States vs. Smith, supra, it was said:

"But the defendant's money transactions with the Government stand on a different footing. The transcript is competent, under Section 886, to show what public moneys the defendant received and what disbursements made by him have been approved."

In that case the defendant was an Indian agent connected with the Shoshone and other Western agencies. Now can it be said that the actual knowledge, or means thereof, of the person in Washington City who made the entries or charges against Smith are shown to be, or in likelihood were, any greater or more certain than that of him who made them against McCoy, or that the one had more certain official knowledge that Smith "received" certain money than the other had that McCoy "failed" to carry certain mail?

The next case cited by the Defendant in Error, United States vs. Jones, 8 Peters, 375, was a case where certain charges in a treasury transcript were held to have been made in gross and not itemized; and further, that they were not made in the ordinary mode of doing business in the department, and that the law had provided other means of certifying copies to make such charges susceptible of prima facie proof.

and on these grounds such entries were rejected as evidence. In that case the Court said:

"The issuing of the warrants to Orr (defendant's intestate), was an official act 'in the ordinary mode of doing business in the department,' and the fact is proved by being certified as the act of Congress requires. But the execution of bills of exchange and orders for money on the treasury, though they may be connected with the settlement of an account, cannot be official information to the accounting officers. In such cases, however, provision has been made by law by which such instruments are made evidence without proof of the hand writing of the drawer. * * * The following item was also objected to by the defendant's counsel, 'to accounts transferred from the books of the Second Auditor for this sum standing to his debit under said contract on the books of the Second Auditor transferred to his debit in this office, $45,000.00.' This item was properly rejected by the Circuit Court. The Act of Congress in making a 'transcript from the books and proceedings of the treasury' evidence, does not mean the statement of an account *in gross*, but as they were acted upon by the accounting officers of the department."

It is impossible to see wherein this case applies to the one at bar.

The next case cited by the Defendant in Error is that of the United States vs. Patterson, Gilp 47, Federal Case No. 16,008. That was a case where the paper offered in evidence was a register's report to the Comptroller and not a certified "transcript from the books and papers of the treasury," and in that case the defendant therein only directed his objection

to the one item, "to balance due on statement of his account per report No. 15,877, $13,723.78." It was said in that decision:

"The question to be tried by this jury is the correctness of this adjusted reported balance, but if it is allowed to prove itself, what is to be tried? If a treasury certificate that such is the balance reported to be due is enough to entitle the United States to a verdict and judgment for that amount, the trial is a mere pretense and useless form, which might be dispensed with and a judgment entered at once upon the production of the certificate. This cannot be the intention of the law."

Of course it is clear that this decision is eminently correct. To merely report a balance as due from a defendant would leave neither a question of law nor of fact to be tried or decided, that is, whether the item was legally charged or not, but the case is not an authority one way or the other in the case at bar.

In the case at bar the items of damage to the United States, by reason of defendant's failure, are clearly and expressly set out in the settled account. If they involve the question of the measure of damage or other legal question, defendants could take advantage thereof upon an objection to its sufficiency or competency as evidence, and likewise it is definite enough if they wish to take issue and disprove either the fact of damage or the amount thereof, or other fact connected with the items.

In the next case cited by Defendant in Error, United States vs. Edwards, 1st McLean, 463, Federal Case No. 15,026, it was decided that a statement of an account *in gross* showing simply balances, was not evidence. Therein it was said:

"The treasury officers seem to pay more regard to their own peculiar forms than to the requisites of the law or the decisions of the courts of the United States. It has long since been decided by the Supreme Court, United States vs. Jones, 8 Pet., 33, U. S., 383, that the Act of Congress in making a transcript from the books and proceedings of the treasury evidence, doesn't mean the statement of an account in gross, but a statement of the items, both of the debits and credits, as they were acted upon by the accounting officers of the department. * * * Controversies frequently arise on treasury adjustments because certain items claimed as credits are disallowed or certain debits are charged, and how can the Court decide on these items if they be not stated in the transcript? A transcript must present the accounts to the Court as they stood before the accounting officers, and the judgment of the Court must be given on this evidence."

The next case cited and quoted by the Defendant in Eror is that of the United States vs. Carr, 132 U. S., 644, wherein it was decided that there was no presumption that the postmasters at Santa Rita and Natividav knew of the terms of a mail carrier's contract and that he was not complying therewith. Just wherein this case applied and is an argument for or against the proposition of the effect of the Postmaster General's finding that the Defendant in Error, McCoy, was a failing contractor, and his knowledge in that regard, it is impossible for me to conceive.

An analysis of the foregoing excerpts will show that the certified statements from the Auditor and other officers in the departments held incompetent therein by the Courts were so held either by reason of the charges being gross charges, mere

balances, or because it was shown that they were not made in the ordinary departmental methods of transacting business. These decisions throughout distinguish between actual and official knowledge and between official knowledge and knowledge derived from hearsay, as the facts are disclosed in these cases, information from hearsay means information from private, not official, sources, and to be incompetent requires the further disqualification of being obtained otherwise than in the ordinary course of doing business. This Court has said in its former opinion (Record, page 31):

"The postmaster at San Francisco appears to have had knowledge of this fact (referring to the abandonment by McCoy of the performance of his contract), and all the subsequent proceedings were based upon his statement of this fact in a telegram to the Second Assistant Postmaster General."

Can it in any sense be said that such information is hearsay? Did not that telegram convey to the Postmaster General, his Assistants and the Auditor and Accountants in that department "official knowledge" of the abandonment by McCoy of the performance of his contract, and with that knowledge render regular and competent all subsequent action, the charges of items, settlement of account and certification? Can it be said that the cablegram to the Secretary of the Navy from an Admiral that he has destroyed a hostile fleet and captured a foreign city doesn't give the former official knowledge of those facts?

I would also cite in this connection:

Soule vs. United States, 100 U. S., pages 8 to 11.
United States vs. Dumas, 149 U. S., page 278.
Culver vs. Uthe, 137 U. S., page 655.
United States vs. Egleston, 25 Federal Cases, Case No. 15,027.
United States vs. Stone, 106 U. S., page 525.

A ruling seems to me necessary to uphold this judgment that the evidence must be a fac simile of the pleadings, and this would result in all suits arising in the departments upon stated accounts in compelling the attorney to set out in his complaint, first, the contract, second, the Auditor's statement of the defendant's account, finding him indebted in so much, and third, refusal and failure to pay. Such a complaint would not give definite and full information of the cause of action sued on that the one in this case did, and I submit that any ruling that the proofs do not correspond with the allegations of the complaint is unjustified under our rules of pleading. Second Ballinger's Code, 4903 and 4906. The stated account is itself evidence of not only the amounts, but the fact of indebtedness itself, which fact includes the breach of contract by failure to carry mails, of which it is complained there is no proof. United States vs. Stone, supra.

There is another feature in this case which I find nothing in the record to convince me received consideration upon the former hearing. The contract between McCoy and the Government provides, among other things (page 86 of the Record):

"And it is further stipulated and agreed, that the Postmaster General may annul this contract for repeated failures; for violating the postal laws; for disobeying the instructions of the Postoffice Department; for refusing to discharge a carrier or any other person employed in the performance of service, when required by the Department; for transmitting commercial intelligence or matter that should go by mail, contrary to the stipulations herein; for transporting persons so engaged as aforesaid; whenever the contractor shall become a postmaster, assistant postmaster, or member of Congress; and whenever, in the opinion of the Postmaster General, the service cannot be safely performed, the revenues collected, or the laws maintained.

"And it is further stipulated and agreed, that such annulment shall not impair the right of the United States to claim damages from said contractor and his sureties under this contract; but such damages may, for the purpose of set-off or counterclaim, in the settlement of any claim of said contractor or his sureties against the United States, whether arising under this contract or otherwise, be assessed and liquidated by the Auditor of the Treasury for the Postoffice Department."

There are many analagous provisions to the above both in the Government's construction contracts and those of private persons giving engineers and architects the authority to determine and declare or certify the performance or failure to perform on the part of the contractor, and it has been uniformly upheld that such determinations, in the absence of fraud, were conclusive. The above quoted portion of the contract in this case gave the Postmaster General power to find there had been failures to perform and that the service could

not be safely performed, and upon that finding to annul the contract, and further, that in such cases the Auditor might assess and liquidate the damages. In pursuance of these provisions, upon information communicated from an official source, on May 18th, 1893, the Postmaster General determined and declared (Record, page 96):

"State of California. No. 76,475.

"Regulation Wagon Service, San Francisco, San Francisco County. Contractor, C. C. McCoy. Pay, $7,700.00.

"Whereas, C. C. McCoy, contractor on this route under the advertisement of September 16, 1889, has failed to perform the service he is hereby declared a failing contractor.

"W. S. BISSELL,
"Postmaster General.

"Date, May 18, 1893."

Thereby not only annulling the contract, but finding that prior to that date, May 18th, 1893, McCoy had "failed to perform the service" thereunder. I believe if the above provision had been called to the attention of this Court upon the former hearing, it would not have decided that a "material allegation of the complaint was that on the 8th day of May the said C. C. McCoy and the said sub-contractors did abandon the said contract and did fail and refuse to perform the same," and that "the statement of McCoy's account by the Auditor of the Postoffice Department, * * * and certificate of the Postmaster General dated May 18th, 1893, declaring that McCoy had failed to perform the service and was a failing contractor, were all legally insufficient to establish the fact that McCoy had wholly abandoned his contract," for I cannot

escape the conviction that the Postmaster General's finding and certification is not only evidence of the failure to perform, but conclusive evidence of that fact.

In further pursuance of the provision above quoted, and also under the authority of the statute, the Auditor of the Treasury for the Postoffice Department, on June 1st, 1895 in a statement and settlement of McCoy's account with the United States, "assessed and liquidated" the damages the Government had sustained by reason of such breach and failure to perform the service contracted for, at $5,772.99. (Record, page 53.)

For the foregoing reasons, it is respectfully submitted that the Court erred as more specially appears by assignments of error, supra, and that the judgment of the lower Court should be reversed, with instructions to enter judgment against defendants for the above amount, interest and costs.

WILSON R. GAY,
United States Attorney.

EDWARD E. CUSHMAN,
Assistant United States Attorney.

IN THE

UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

C. C. McCOY, DAVID W. SMALL, WILLIAM O'DONNELL and THOMAS MOSGROVE,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR

Upon Writ of Error to the Circuit Court of the United States for the District of Washington, Southern Division.

W. T. DOVELL,
Walla Walla, Washington,
Attorney for Defendants in Error.

IN THE

UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

C. C. McCOY, DAVID W. SMALL, WILLIAM O'DONNELL and THOMAS MOSGROVE,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR

STATEMENT.

This case was begun on the 6th day of November 1895 and after continuances were repeatedly had at the instance of the government, was finally tried on November 15, 1899. At that time a judgment of non-suit was entered at the close of plaintiff's case. A writ of error was had to this court, and on October 8, 1900 the cause was reversed and remanded to the Circuit Court for further pro-

ceedings in accordance with the opinion of this Court which was published at that time in 104 Federal, page 669 and is found in the record at page 26.

At the November 1900 term of the Circuit Court the parties went to trial again. The government after it had presented the identical evidence offered upon the former trial and no more, closed its case. Strictly obeying the mandate of this Court and submitting to the law of the case as defined by the opinion, the defendants in error consented to a verdict against them for the five dollar item of fine included in the account and asked for a judgment of non-suit as to the other items. Such a judgment was entered and the government has sued out a second writ of error, *assigning practically the same error as was assigned upon the first appeal.*

ARGUMENT.

We will notice only briefly the assignment of error in the refusal of the Court to grant a continuance because of the absence of the witness Ford. We were so anxious to have this matter determined that we consented to another trial although we doubted if the Government was entitled to it under the mandate. The trial was set for May 9, 1901, *at the request of Attorney for Government*, (record page 51). The learned trial judge was familiar with the dilatory course that had been pursued by the Government since these cases had been begun. No showing was made of due diligence to obtain the testimony of Ford. He resided beyond the limits where he could be compelled

to respond to a subpoena. The cases had been pending and had been at issue for years and no effort had been made to obtain his deposition. The presumption is that no such effort ever would be made. The rule is familiar that when due diligence has not been used to obtain a deposition of an absent witness, and the Court is not assured that such witness will be present at a subsequent term a continuance should be refused. No less familiar is the rule that the granting or refusal of a continuance is within the discretion of the trial judge and no error can be predicated upon his exercise of that discretion unless an abuse of it is apparent.

4 Encyclopoedia of Pleading and Practice, pp. 835, 859.

With a charming nonchalance, the Attorney for the Government disregards the opinion of the Court *rendered upon the same facts in the same case* and attempts to argue anew the matters involved in the first appeal. When the Court said in its opinion "The Court was therefore right in holding that the documents offered in evidence by the plaintiff were legally insufficient to make out a prima facie case for damages on account of the alleged entire failure of McCoy to perform the service provided in his contract," that statement became the law of the case. The lower court followed that law in its ruling upon the second trial and now the attorney for the government assigns that ruling as error in the very Court which announced it.

Whatever has been decided upon one writ of error or appeal can not be reviewed upon a second writ of error or appeal brought in the same suit. The first decision has become the settled law of the case. This is the statement of a rule laid down long ago by the Supreme Court of the United States, followed uniformly there and in all the Federal Courts and as nearly as the writer has been able to ascertain in the Appellate Court of all the States unless it be Nebraska, Texas, Utah and Missouri.

As a few of those cases we cite:

Thompson vs. Maxwell Land Grant & R. Co., 168 U. S. 451.

Great Western Telegraph Co., vs. Burnham, 162 U. S. 339.

Northern Pac. R. R. Co., vs. Ellis, 144 U. S. 458.

Clark vs. Kieth, 106 U. S. 464.

Supervisors vs. Kennicott, 94 U. S. 498.

Wright vs. Columbus H. V. & A. R. Co., 20 Sp. Ct. Rep. 398.

An exhaustive note upon the effect of this rule is found in 34 L. R. A. 321.

Further citation of authority upon this well established principle would not be in place as this Court has clearly adopted it in

Matthews vs. Columbia Nat. Bank, 100 Fed. 393.

No application for a review or rehearing of the former decision of this Court was made. The learned counsel for Government has now filed a brief in which he urges no new reason and cites not a single authority which was not called to the Court's attention at the former hearing but seeks by a transparent paraphrase of the argument used before to overturn what has become the law of the case by virtue of the opinion and mandate of this Court.

There being no question involved except what was brought up and considered by the Court upon the former writ of error, we respectfully ask that this appeal be dismissed without a hearing upon the propositions submitted in the brief of plaintiff.

For the purpose of keeping our whole case together, but with the prayer that we may not be deemed contemptuous in repeating an argument upon propositions already decided by this Court in this case, we print the substance of the argument used by us upon the former hearing of this cause.

A material allegation of the complaint, put in issue by the general denial was "that on the 8th day of May, 1893, the said C. C. McCoy and the said subcontractors did abandon the said contract and did fail and refuse to perform the same." This allegation so denied must be proved by the plaintiff. Were the transcripts from the department unassisted sufficient to prove this?

For the convenience of the Department in the administration of public business it has been found necessary to provide that when adjustments are made by the proper officers of the Department such adjustment of account shall be taken as prima facie correct by the Court in which judgement is sought, and this, we believe, is as far as the law makers intended to go. It is charged in the complaint that the contract entered into between the defendants in error and the United States was broken by the failure of McCoy to carry the mails according to the contract. This is a matter of which the Auditor of the Postoffice Department has absolutely no knowledge. In order for the Government to recover in this case it must prove that McCoy failed to carry the mails as he had agreed. Can it be said that the sixth Auditor of the Treasury may, sitting in his office in Washington City, make a charge upon his books against a contractor and by certifying the transcript of that charge to some judicial tribunal establish the fact that the contractor who had agreed to carry the mails in the city of San Francisco had failed to so carry them?

Before the Government can recover there must be established in this case a substantive fact, namely, that McCoy failed to comply with his contract. After they have established that substantive fact it is probably true that a statement such as exhibit B would establish prima facie amounts lost by the Government on account thereof.

We call the Court's attention to the case of the United States vs. Case, 49 Fed. Rep., 270. Our idea of the meaning and effect of this statute is well expressed in this case.

"If this sweeping and arbitrary power is to be conceded to the officers of the Department, they would as well have made the deficiency twice or three times as great as it is. They have only to make a charge, no matter how unfounded it may be, and have it certified, and the postmaster and his bondsmen are without remedy. . . . It is thought, however, that it was not the intention of the law that executive officers should be clothed with the power thus to usurp the province of court and jury and decide finally and irrevocably questions of facts upon ex parte and hearsay statements. Such power is not found in the section of the statute referred to."

What could be a more flagrant violation of the simplest rules of justice than to say that the Auditor of the Post-office Department can make out a prima facie case against the defendant in error merely by signing such a certificate as exhibit "B?" How does *he* know there was a violation of the contract? His means of knowledge is set out in the record at page 93. It consists of two telegrams signed "Backus, Posmaster." In other words, the Second Assistant Posmaster General at Washington, D. C., received the telegrams bearing the name of Backus, Postmaster, stating that route No. 76475 was down. Upon evidence which is worse than hearsay, for he has no personal knowledge of the fact, and no means of knowing by whom this telegram was actually sent, he certifies his knowledge thus obtained to the Auditor of the Treasury, and upon that the Auditor makes a certificate and the Government without further evidence, seeks judgement against the contractor. We believe no such construction of the statutes is warranted

United States vs. Forsythe, 6 McLean, 584; Fed. Case No. 15123.

As was well stated in the case of United States vs. Burford, 3 Peters, 12: "An account stated at the Treasury Department which does not arise in the ordinary mode of doing business in that department can derive no additional validity from being certified under the act of Congress. Such a statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the Department, where the transactions are shown by it books. In these cases the officers may well certify, for they must have official knowledge of the facts stated."

In the case of United States vs. Smith, 35 Fed., page 490, the Court refused to charge an Indian Agent under section 886 R. S. upon a transcript containing a charge in gross, because "the transcript of a consolidated account does not show of what the property consisted, nor the manner in which the value of the same was ascertained."

In the case at bar the records show that the fact of delinquency of the contractor was ascertained by incompetent evidence and we believe the reasoning in the case last cited may be well applied to the case at bar. We cite further in support of our contention:

United States vs. Jones, 8 Peters, 375.

United States vs. Patterson, Gilp, 47, Fed., Case No. 16008.

United States vs. Edwards, 1 McLean, 463, Fed. Case No. 15026.

United States vs. Parr, 132 U. S., 644.

The case last cited answers the contention that may be made by plaintiff in error that the Court has the right to rely upon the presumption that public officers have done their duty and that this contract would not have been relet, nor a charge made aginst McCoy if he had not defaulted. The language approved by the Supreme Court is as follows: "The presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption, but it does not supply proof of a substantive fact."

Plaintiff in error relies upon three principal cases to support its contention. Soules vs. United States, 100 U. S., 8; United States vs. Dumas, 149 U. S., 278; United States vs. Stone, 106 U. S., 528. All that appears from the Soule case is the holding of the Court that such transcripts are no more than prima facie evidence of the correctness of the balance certified. In that case the transcript purported to be a copy of the account between an internal revenue collector and the United States. The point properly decided in that case is that accounting officers have a right to re-state a balance in order to correct a mistake. We do not think the Dumas case contains anything which can be of any help in the determination of the case at bar. In that case (page 283) it appears that counsel for the

Government alleged as error the failure of the Court below to instruct the jury that the transcript constituted conclusive, rather than prima facie, evidence of the balance due to the United States. The Court holds that the transcript was *at most* prima facie evidence, and it appears (page 279) that the transcript in that case is more full and complete than in this case, inasmuch as it had appended copies of papers pertaining to the account, and we make no doubt that the balances in the case claimed to be due the Government were shown by competent evidence which was attached to the transcript. We believe the closing words of the Stone case will show that the point in controversy did not arise in that case.

We believe there is an additional objection to the last item charged against McCoy in exhibit "B," being the difference between his contract and the contract of a subsequent contractor. Courts of law will not go behind adjustments made by officers of the different Departments when they have proceeded properly in making those adjustments. If it be made to appear to the Court that the officers of the Land Department, or the officers of the Treasury Department, or any other Department of the Executive branch have, in reaching a determination, proceeded upon an erroneous conception of the law, the Court will inquire into the decision and reverse it. We insist it is evident from the face of this account that in charging the last item of $3587.87 to McCoy the officers of the Treasury Department took as a criterion a measure of damage which is not warranted by the law. If McCoy did violate his contract the measure of damage is the difference between

his contract price and the value of the same service in the open market, and the difference between McCoy's contract and the contract price of Max Popper is not the measure of damage; hence it appears that the officers of the treasury Department adopted a wrong standard, an erroneous criterion in their assessment of damages against McCoy, and it should therefore fall. In the case of the United States vs. Patterson, and in some of the other cases heretofore cited, the Court refused to admit in evidence a transcript which contained a charge in gross but did not set forth the whole account and the item from which it arose. How much stronger reason, therefore, for rejecting an item in a transcript which appears to have been illegally made. Suppose this last item was as follows: "To difference between the contract of McCoy at $7700 and the cost of the Spanish-American war," and the difference was charged to McCoy. The absurdity of such a charge would at once appear and it would be stricken out. We insist that the charge in its present shape is just as absurd.

We take it that we need not enlarge at length upon our reason for the contention that the telegrams at page 93 are incompetent. They appear to be copies of telegrams received in the office of the Second Assistant Post Master General. The original papers of which these transcripts are copies would not be evidence, and, as several of the authorities heretofore cited say, no officer can make competent evidence out of incompetent evidence by certifying to it. If it was sought to show that Backus, Postmaster, informed the Department by telegram that the route was down the best evidence of that fact would be the original

telegrams sent by Backus. The papers from which these copies are made are incompetent, therefore the transcripts are incompetent and of no legal sufficiency. In order to convenience the officers of the Government it may be necessary to give them many privileges, but as long as the constitutional provision that property shall not be taken without due process of law remains we imagine that all of the rules of evidence will not be abrogated unless Congress does so in express terms. And until Congress does do so the officers of the Treasury Department will not be able to bundle up a mass of incompetent evidence lying about their respective offices and by attaching a certificate to it send it out to the different Courts of the land and demand that upon that alone judgement shall be entered and execution awarded against the property of a private citizen. The absurdity of their effort to make competent evidence out of incompetent evidence appears in several places in the record. One instance is the telegrams above referred to: Another is the certificate of William O. Fallon, page 54 of the record, which appears to be inserted in the record for the purpose of proving that demand was made upon the bondsmen. The original letter on file in the Department would not be evidence because it would be only hearsay, consequently this copy is not evidence. Upon page 93 is a copy of a letter by which it is evidently sought to prove that notice was served upon C. C. McCoy, but no proof of the mailing of the letter is appended, nor is there any proof that the place to which it purports to have been directed was the place of residence of C. C. McCoy. An elementary knowledge of the principles of the law would suffice to inform the officers of the Department that none

of such matter was legal evidence, and the Court below did not err in granting a judgement of non-suit because of the illegal insufficiency of the evidence upon which the Government rested its case, because it had failed to prove by any competent evidence that McCoy had ever violated the contract he had engaged to perform.

For six years we have come to the bar of the Federal Court twice each year seeking for a judgement that would be final in this and other cases depending upon the same facts the pendency of which has made unstable the fortunes of our clients. In the Government's own good time it went to trial. We prevailed. We followed their writ of error to this Court, and went back to the lower Court to obey its mandate. That there might be an end we met them in another trial to which we do not believe they were entitled. We prevailed again, and again we follow their writ of error. Twice the Government has failed to prove its case after full opportunity given. Once already every question involved has been passed upon by this Court of final resort. There being no new matter assigned, may it please your Honors to dismiss this writ of error and show us an end to this litigation which we are loth to leave as our single heritage to our heirs.

Respectfully submitted

W. T. DOVELL,

Attorney for Defendants in Error..

No. 708

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA, *Plaintiff in Error,* vs. C. C. MCCOY, DAVID W. SMALL, WILLIAM O'DONNELL and THOMAS MOSGROVE, *Defendants in Error.*	No. 708.

REPLY BRIEF FOR THE UNITED STATES.

Upon Writ of Error to the Circuit Court of the United States for the District of Washington, Southern Division.

WILSON R. GAY,
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IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA, *Plaintiff in Error,* vs. C. C. MCCOY, DAVID W. SMALL, WILLIAM O'DONNELL and THOMAS MOSGROVE, *Defendants in Error.*	No. 708.

REPLY BRIEF FOR THE UNITED STATES.

Upon Writ of Error to the Circuit Court of the United States for the District of Washington, Southern Division.

STATEMENT.

There is an error in the recital preceding the opinion of this Court regarding what the record shows, to which attention is called. It is stated therein (Record, page 28), "and on May 17th, 1893, said McCoy having failed to perform service on route No. 76,475, an order was made by the Second Assistant Post Master General declaring the said C. C. McCoy a failing contractor."

The order above referred to was not made by the Second Assistant Postmaster General, but by the Postmaster General. (Record, page 96.) The mistake probably arose from the letter of notification of the making of that order to C. C. McCoy by J. Lowry Bell, Second Assistant Postmaster General. (Record, page 94.) It is thought this mistake, if relied upon, might mislead, if the decision herein should turn upon the point made in the main brief of Plaintiff in Error (page 19 et seq.) That is, that the Postmaster General might annul the contract under its terms for repeated failures, etc. ; for though the Second Assistant Postmaster General might under statute perform duties imposed upon the Postmaster General by law, yet the power or discretion vested in him by the contract itself probably could not be delegated.

Regarding the opening sentence of the brief of Defendant in Error, attention is called to the fact that there is no reference made to any portion of the record supporting the statement therein,—that continuances had been repeatedly had of this cause in the Circuit Court at the instance of the Government, and there is nothing in the record to support such a statement.

ARGUMENT.

Regarding the error assigned of the Court's refusal to continue on the showing of Plaintiff in Error, it is stated in the brief of Defendant in Error as one of the reasons for refusing the continuance (page 2 thereof), "the learned trial Judge was familiar with the dilatory

course that had been pursued by the Government since these cases had been begun." There is nothing in the record to support that assertion. The reasons which the Court gave for the refusal to continue will be found on pages 51 and 52 of the Record, and the above quoted is not one of those given, and presumably, *expressio unius est exclusio alterius.*

It is submitted that the affidavit (Record, pages 48 to 50), discloses due diligence on the part of the Government to secure the wanting evidence. The Defendant in Error's criticism that though the case had been pending for years no effort had been made to take the deposition of Ford is unfair, for as the Record shows, the requirement of parol evidence of this character had only been disclosed by the opinion of this Court upon the former hearing. Up to that time the Government had no intimation but what its theory of the case that the Auditor's certified accounts were sufficient was sound. The Government had brought this case on for trial at the next term of the Circuit Court after that decision, that is, the next term at which it could practicably be brought on in view of the time allowed for filing a petition for re-hearing. (Record, page 51. Brief of Defendant in Error, page 2.)

The character of diligence required in such cases is reasonable diligence. There is no absolute standard. It depends upon the usual course of procedure and methods of doing business, and it is submitted that the learned Judge below erred in applying to the absent witness, a servant of the Government, with official knowledge, whom the Government itself had asked to

attend upon the Court to testify in its behalf, the same rules that might apply in the case of an ordinary witness. There is nothing to justify the inference or presumption that the witness had refused or would refuse to obey the command or request of the Government employing him in this particular. But even if the rules applying to an ordinary witness were to obtain, the excuse as offered for the absence of this witness was sufficient, and entitled Plaintiff in Error to a continuance. (4th Encyclopædia of Pleading and Practice, 861, and cases cited.)

RES ADJUDICATA.

If the argument of counsel for Defendant in Error on this point is to prevail, we are placed in this position : This Court having indicated in its opinion from what sources the testimony held to be wanting could be obtained, it was manifestly simpler and more satisfactory to secure the testimony of a witness to testify to the breach and default of McCoy than to petition for and argue a re-hearing, and the Government did all it could to comply with the order and opinion of this Court to remedy the adjudged defect upon the first trial. Without the fault of the Plaintiff in Error it was deprived of the benefit of that testimony, and also the further opportunity to secure it. Now we are told that these questions are settled past further consideration. The Circuit Court would not re-consider them for the manifest impropriety of ignoring and opposing the position taken by this, its superior tribunal, and a

review of the judgment of this Court by the Supreme Court, which judgment determines that the matter is res adjudicata, is doubtful. Therefore if this Court's announcement of the law applicable to this case has become fixed beyond consideration, and like the Median laws, the advisability of its change will not be debated, it seems that Plaintiff in Error, without its fault, has been deprived of valuable rights.

Aside from this argument of *harshness* and inconvenience, there is nothing in the doctrine of *res adjudicata* or law of the case to preclude the consideration of the sufficiency of this evidence. The reasons that led to the expressions contained in the former opinion of this case were no doubt weighty and well digested, and if not overcome on a reconsideration, would be all sufficient without resorting to an *ipse dixit.*

Upon the mandate this cause went back for a new trial, and it stood in the lower Court as any other case ready for trial. The pleadings might have been amended, or other testimony introduced. There was nothing final about it which might have been reviewed in an Appellate Court.

"When a case is reversed and remanded for further proceedings, generally a new trial should be had." (2nd Volume Pleading & Practice, 853 and cases cited.)

"A cause remanded without specific directions stands in the lower Court as if no trial had occurred or judgment had been rendered." (Volume II., Pleading &

Practice, 851, and cases cited. See also idem 858 and 860 and Vol. III. of Century Digest, page 2822, Section 4710 et seq.)

When other or similar questions and exceptions arise upon such new trial, there is nothing in reason or authority to justify a refusal to consider them. The cases cited by Defendant in Error, page 4 of his brief, in support of his position in this case, that the question of the sufficiency of the evidence offered is *res adjudicata*, are, so far as that contention is concerned, unhappily chosen, for in the first case cited, Thompson vs. Maxwell, etc., 168 U. S., 451, it was decided that in the first appeal certain matters were terminated and so expressed in the opinion and in the mandate, but the case was remanded and left open for amendment and additional proof on other points, and on the second appeal the Court properly refused to open up the whole case. It will be seen that this was much such a case as another one cited by the Defendant in Error, to-wit, Mathews vs. Columbia National Bank, 100 Federal, 393, which was a case decided by this Court, wherein it was on the first appeal decided that the plaintiff could not recover on his complaint, and the case was remanded for the purpose of trying the issues raised by the defendant's cross-complaint, and on the second appeal it was decided that the plaintiff could not go into the questions decided on the first appeal regarding the sufficiency of his cause of action outlined in the complaint. It will be seen that in both of these cases that certain issues had been determined, and the cause remanded for a trial on a portion of the issues not

determined, and were not cases like the one at bar, where a trial *de novo* on all issues was had.

In the next case relied upon by the Defendant in Error, the Great Western Telegraph Co. vs. Burnham, 162 U. S., 339, it is decided that an appeal does not lie to the Supreme Court of the United States from a judgment of an *inferior* state court.

The next case cited by Defendant in Error, Northern Pacific R. R. Co. vs. Ellis, 144 U. S., 458, merely decides that the decision of the highest court of a state that a former judgment of the same court in the same case was *res adjudicata*, in that case, as to the rights of the parties, involves no Federal question to give the Supreme Court of the United States jurisdiction.

The case cited by Defendant in Error, Supervisors vs. Kennicott, 94 U. S., 498, seems to me to recognize the distinction that eliminates the case at bar from the general rule which the cases cited by the Defendant in Error partly establish. That is, that the rule of *res adjudicata* to be successfully invoked on a second appeal must be based upon something determined and contained in the order and judgment made upon the first appeal, and that it does not apply or control in cases where it has been generally remanded to the lower Court for a new trial, for the Court again and again in ruling that the question was *res adjudicata* calls attention to the fact that the cause had not been remanded for a new trial or trial *de novo*, and therefore the matters discussed were the law of the case, plainly implying that if it had been remanded for a new trial such would not have been the case.

The next case cited by the Defendant in Error, Wright vs. Columbus, etc., 20 Supreme Court Reporter, 398, does not involve the question of *res ajudicata* at all, but that of *stare decisis.*

In the case of the City of Hastings vs. Foxworthy, a Nebraska case, reported in the 63rd Northwestern at 955, the Court reviews in extenso the cases generally relied upon by those invoking the rule of *res ajudicata* or law of the case to prevent the consideration of points alleged to have been terminated upon the first appeal or decision. The Court examines not only the Federal cases on this question, but those of California and other States, and after a careful review of such cases, justifiably concludes :

"The Supreme Court of the United States and other Courts having once entered judgments or decrees, finally ajudicating certain issues, decided very properly that on a second appeal nothing so adjudicated could be relitigated. Other courts decline to permit a party after an unsuccessful appeal to prosecute a second appeal from the same judgment. A few courts, notably California, failing to draw the distinction between a judgment upon the merits and a *venire de novo*, adopted these cases as authority for the proposition that, where a new trial had been awarded, the Court could not, on a second appeal, re-examine any questions of law decided on the first. Having gone so far, they were driven to the further conclusion that the principle applies to every question involved in the first appeal, whether in fact examined or not. Then in a few instances, after this doctrine had been established, but never in a case of first impression, some reasons have been given in its support. That usually given is that the first opinion is an adjudication. It needs but a moment's reflection to show that there is no adjudication by the expression of an opinion upon a point of law where no judgment is entered in accordance with that opinion, but the cause

is remanded generally. The only thing adjudicated is that there was error in the record, and that the whole case should be relitigated. To apply the rules of *res adjudicata* to such a case would require a further holding that, where a court has over-ruled a demurrer, it may not afterwards, on the trial dismiss the case, because no cause of action is stated ; or, having granted a temporary injunction, that it may not dissolve that injunction if it becomes satisfied that it was improvidently granted. * * * * * Why should the rule be more stringent when the same case is up for review, the erroneous judgment still unexecuted, the parties before the Court, and the case in such a situation that by the correction of its error no injustice will be done, beyond, perhaps, the creation of additional costs ? If the doctrine contended for is to prevail here, then it follows that the only instance in which the Court is not permitted to correct its mistakes, or refuse to do so, is also the only instance where the mistake can be corrected without injustice."

There are many other cases following the rule laid down in the above quoted case, which is the rule followed in those States opposed to the California doctrine.

So far as the motion or request of Defendant in Error that this Court dismiss the writ of error, on the ground that these matters were *res adjudicata*, is concerned, he has stated no authority to support it, and there is no such authority. In fact, one of the cases cited by him, to-wit, Great Western Telegraph Co. vs. Burnham, supra, decides point blank that such is not the proper practice, but that if the questions are *res adjudicata*, the judgment should be affirmed and the appeal should not be dismissed.

Aside from the abstract question of *res adjudicata* on second appeal and writs of error, as argued by Defendant in Error, that doctrine is not applicable to this suit. Where there has been a reversal and general remand as in the case at bar, and the question of *res adjudicata* is raised, all the cases show that where the mandate does not set forth the determination, invoked as the law of the case, and the Court looks beyond the mandate to the opinion to ascertain what has been decided, it will examine the reasons and arguments as there outlined to discover if on the former appeal all the matters presented in the later were presented, considered and disposed of in the first.

Now I submit that a perusal of the opinion of this Court on the former appeal (Record, pages 26 to 32 inclusive), discloses that the Court decided that the weak point in the chain of evidence offered by the Government was because the *statute* did not authorize the Postmaster General to make a certificate that the contractor had abandoned his contract, nor provide that such certificate should be admitted in evidence when made, and that neither the question of the sufficiency of the certified account of the Auditor as presented and argued in the main brief of Plaintiff in Error, pages 6 to 18 inclusive, nor the question of the sufficiency and effect of the certificate of the Postmaster General under the provisions of the contract as presented and argued in the main brief of Plaintiff in Error, pages 18 to 21 inclusive, were considered or passed on upon the former writ of error in this case.

Wherefore, it is respectfully submitted that the lower

Court erred, as more at large appears in the specifications of error herein, and that Plaintiff in Error is entitled to a consideration and review of those errors by this Court, and a reversal of the judgment of the Circuit Court.

WILSON R. GAY,
United States Attorney.

EDWARD E. CUSHMAN,
Assistant United States Attorney.

No. 710

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE ALASKA UNITED GOLD MINING COMPANY,
Plaintiff in Error,

vs.

HENRY MUSSET, as Administrator of the Estate of Edward Hegman, Deceased,
Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court for Alaska, Division No. 1.

Filmer-Rollins Co. Print, 424 Sansome St., S. F.

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In the United States District Court for Alaska, Division No. 1, at Juneau.

HENRY MUSSET, as Administrator of the Estate of Edward Hegman, Deceased,

Plaintiff,

vs.

THE ALASKA UNITED GOLD MINING CO.,

Defendant.

No. 23A.

Writ of Error (Original).

United States of America—ss.

The President of the United States, to the Judge of the United States District Court for Alaska, Division No. 1, at Juneau, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Henry Musset, as administrator of the estate of Edward Hegman, deceased, plaintiff, and The Alaska United Gold Mining Co., defendant, a manifest error hath happened, to the great damage of the said Alaska United Gold Mining Co., as is said and appear by the complaint; we, be-

ing willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the courtrooms of said Court in the city of San Francisco, together with this writ, so that you have the same at the said place on the 10th day of June next, that the record and proceedings aforesaid being inspected, the said Justices of the said Circuit Court of Appeals may cause further to be done therein, to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 15 day of April, in the year of our Lord, one thousand nine hundred and one, and of the independence of the United States the one hundred and twenty-sixth.

[Seal] W. J. HILLS,

Clerk of the United States District Court for Alaska, Division No. 1.

The foregoing writ is hereby allowed.

M. C. BROWN,

Judge.

[Endorsed]: Original. No. 23A. In the United States District Court for Alaska, Division No. 1, at Juneau. Henry Musset, as Administrator of the Estate of Edw'd

Hegman, Deceased, Plaintiff, vs. Alaska United Gold Mining Co., Defendant. Writ of Error. Filed Apr. 17, 1901. W J. Hills, Clerk. Malony & Cobb, Attorneys for Defendant. Office, Juneau, Alaska.

No. 710. United States Circuit Court of Appeals for the Ninth Circuit. Alaska United Gold Mining Company vs. Henry Musset, as Administrator, etc. Original Writ of Error. Filed June 13, 1901. F. D. Monckton, Clerk.

In the United States District Court for Alaska, Division No. 1, at Juneau.

HENRY MUSSET, as Administrator of the Estate of Edward Hegman, Deceased,

Plaintiff,

vs.

THE ALASKA UNITED GOLD MINING CO.,

Defendant.

No. 23A.

Citation (Original).

United States of America—ss.

To Henry Musset, as Administrator of the Estate of Edward Hegman, Deceased, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals

for the Ninth Circuit, to be holden at the city of San Francisco, on the 20th day of June, 1901, pursuant to a writ of error filed in the clerk's office of the United States District Court for Alaska, Division No. 1, at Juneau, wherein the Alaska United Gold Mining Co. is the plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated May 13th, 1901.

MELVILLE C. BROWN,
Judge.

United States,
District of Alaska, } ss.
Division No. 1.

I hereby certify that I received the within citation of error May 20th, 1901, and served the same May 20th, 1901, in Juneau, Alaska, by delivering to W. E. Crews, one of plaintiff's attorney, a certified copy of the within citation, certified to by Malony and Cobb, defendant's attorney, to the said W. E. Crews, personally.

Dated Juneau, May 20th, 1901.

JAMES M. SHOUP,
United States Marshal.
By W. S. Staley,
Office Deputy.

Marshal's Fees:

Services $3.00

Paid by defendant's attorneys.

[Endorsed]: Original. No. 23A. In the United States District Court for Alaska, Division No. 1, at Juneau. Henry Musset, as Administrator of the Estate of E. Hegman, Deceased, Plaintiff, vs. The Alaska United Gold Mining Co., Defendant. Citation in Error. Filed May 20, 1901. W. J. Hills, Clerk. Malony & Cobb, Attorneys for Defendant, Office, Juneau, Alaska.

No. 710. United States Circuit Court of Appeals for the Ninth Circuit. Alaska United Gold Mining Company vs. Henry Muset, as Administrator, etc. Original Citation. Filed June 13, 1901. F. D. Monckton, Clerk.

United States of America, } ss.
District of Alaska. }

Pleas and proceedings in a cause at law, tried at a special term of the United States District Court for Alaska, Division No. 1, begun and held at Juneau, in said District, on the 10th day of December, 1900, and ending on the 30th day of March, 1901.

Present: The Honorable M. C. BROWN, Judge; Honorable J. M. SHOUP, Marshal; Honorable ROBERT A. FREIDRICKS, District Attorney; and Honorable W. J. HILLS, Clerk.

On the 27th day of November, 1900, Henry Muset, as administrator of the estate of Edward Hegman, deceased, filed his complaint against the Alaska United Gold Mining Company, which complaint is in words and figures as follows:

In the District Court of the District of Alaska.

HENRY *MUSET*, Administrator of the Estate of Edward Hegman, Deceased,
Plaintiff,

vs.

THE ALASKA UNITED GOLD MINING COMPANY (a Corporation),
Defendant.

Complaint.

The plaintiff compains of the defendant and alleges:

I.

That defendant is a corporation duly organized and existing now, and at all times hereinafter mentioned was, engaged in conducting, operating, and working the gold mines of the said company at Douglas Island, in the District of Alaska.

II.

That Edward Hegman died at Douglas Island, Alaska, on the 9th day of October, 1900, leaving a mother, one sister and an aunt, residing, respectively, the said mother residing at Vasa, Finland, and the sister in the State of Michigan, U. S. A., as his sole surviving heirs at law, and this plaintiff as his principal creditor, residing at Doug-

has, in the District of Alaska and thereafter on the 21st day of November 1900, this plaintiff was duly appointed and qualified as administrator of the estate of the said Edward Hegman, and this plaintiff is now acting as such administrator.

III.

That on October 9th, 1900, and for a long time prior thereto, the said Edward Hegman was an employee of the defendant corporation, working in their said mine, known as the Seven Hundred Foot Claim, then and there operated by defendant, as a miner, running and operating what is commonly known as a machine drill, in the underground workings of said mine. That while so employed and while performing his duties as such employee, and acting under the directions and instructions of the foreman of said mine and the other agents, officers and vice-principals of defendant in control of that branch and department of the defendant workings, wherein the said Edward Hegman was so engaged.

That while the said Edward Hegman, and his colaborers were at the bottom of a shaft in the said mine sinking the same, pursuant to the orders and directions of the foreman and vice-principal aforesaid, while they had sunk drill holes in the bottom thereof and had loaded the same with powder and fuse, preparatory to blasting and after having given the proper signals indicating their purpose and intentions of lighting and firing off said blast, and after the parties in charge of the hoist had indicated by signal that they understood that the said blasts were

about to be lighted and shot off, thus indicating their readiness and ability to hoist the said Edward Hegman and his associates out of said shaft after the fuse connected with the charge had been lighted and before the said blast went off or exploded.

That acting upon said signals and believing in the safety of the regulations, machinery, and operations thereof, the said Edward Hegman and his associates did light said fuses and gave the proper signal to the parties in charge of the elevator to be hoisted from said shaft, whereupon and after the said Edward Hegman and his associates had made all preparations and climbed into the elevator to be hoisted to a place of safety they were informed by the party above them and in charge of the elevator that the air had been cut off from the surface about five hundred (500) feet above and it was impossible for the hoist or elevator to be raised. After making every possible effort to induce the parties in charge of the elevator to hoist the same, the said Edward Hegman and his associates attempted to escape death and injury from the explosion of said blast by climbing the rope attached to the hoist or elevator. That the said Edward Hegman, though making every effort possible to so escape, and resorting to every possible means to avoid the consequences of the explosion could not possibly do so, whereupon the said blast did explode, thereby mangling and wounding the said Edward Hegman, whereby he did then and there die.

IV.

The plaintiff alleges that the said Edward Hegman did in no way contribute to his said death, and that the same occurred without any fault or negligence on his part.

V.

The plaintiff further alleges that the death of the said Edward Hegman was brought about through the gross negligence and carelessness of the officers, foreman and vice-principal of said defendant corporation in causing said air and power to be disconnected and cut off, so that the said elevator could not be hoisted and the said Hegman be removed from the said cause of danger.

Plaintiff further alleges that said officers and vice-principals of said corporation well knew, or ought to have known, at the time he caused said air to be disconnected that the said Hegman was in said place of danger, and could not escape without the use of said power, which the said officers aforesaid wrongfully, unlawfully and negligently caused to be disconnected.

VI.

That at the time of his death, and for a long time prior thereto, the said Edward Hegman was a strong and healthy and robust man, in the prime of life, being the age of 30 years at the time of his death and at all times contributed to the support of his mother, sister, and aunt, who were dependent on him. That by reason of the wrongful, negligent, and unlawful killing of the said Edward Hegman by the defendant as aforesaid the said mother, sister, and aunt, heirs at law of the said Edward

Hegman, have been deprived of the support and earnings of the said Edward Hegman to their great and irreparable injury and damage.

VII.

That by reason of the premises and under the provisions of section 353 of the laws of the District of Alaska the defendant corporation in negligently, wrongfully, and unlawfully causing the death of the said Edward Hegman as aforesaid, damaged the heirs and estate of the said Edward Hegman and this plaintiff in the sum of ten thousand ($10,000) dollars.

Wherefore, plaintiff prays judgment against the defendant for the sum of ten thousand ($10,000) dollars, together with the costs and disbursements of this action.

(Signed) W. E. CREWS,
Attorney for the Plaintiff.

United States of America,
District of Alaska. } ss.

Henry Muset, being first duly sworn upon his oath says: I am the plaintiff in the above-entitled action; I have read the foregoing complaint and know the contents thereof, and the same is true.

(Signed) HENRY MUSET.

Subscribed and sworn to before me this 27th day of November, A. D. 1900.

[Seal]

W. J. HILLS,
Clerk of Court.

[Endorsed]: 23A. In the District Court for the District of Alaska. Henry Muset, Administrator of the Estate of Edward Hegman, Deceased, vs. The Alaska United Gold Mining Company. Complaint. Filed Nov. 27th, 1900. W. J. Hills, Clerk. W. E. Crews, Attorney for Plaintiff.

Afterwards, on the 28th day of December, 1900, the defendant The Alaska United Gold Mining Co., filed its special answer, which is in words and figures as follows, to wit:

In the United States District Court for Alaska, Division No. 1 at Juneau.

HENRY MUSET, Administrator of the Estate of Edward Hegman, Deceased,
Plaintiff,

vs.

ALASKA UNITED GOLD MINING CO.,
Defendant.

Special Answer.

Now comes the defendant and answering specially the complaint of plaintiff, by way of a plea to the same for defense thereto, alleges:

That the plaintiff has not the legal capacity to maintain this suit; for that plaintiff is suing herein as administrator of the estate of Edward Hegman deceased, and for an alleged tort against said Edward Hegman, under and by virtue of the provision of section 353 of the Alaska Code, saving such cause of action to him as such administrator; but the defendant denies that plaintiff Henry Muset is the duly qualified and acting administrator of the estate of Edward Hegman, deceased; denies that on the 21st day of November, 1900, or at any other time, plaintiff was duly appointed and qualified as administrator of the estate of said Edward Hegman, or that plaintiff is now acting as such administrator or has any authority or power so to act, for that the letters of administration, under and by virtue of which plaintiff claims the appointment and authority aforesaid, were granted and issued to him upon an ex parte application therefor without any process being issued or any notice whatsoever being given by the Court granting the same. That said pretended letters of administration were issued by the United States Commissioner's Court sitting as a Probate Court at Douglas Island, Alaska, which Court had full probate jurisdiction, but said Court never obtained any jurisdiction to make said appointment, for the reason that no process was ever issued and no notice ever given of a hearing of said application. That said application for letters of administration was heard and granted on the day such application was made in a purely ex parte proceeding. All of which defendant is ready to verify.

Wherefore, defendant prays judgment of the Court whether it need make any other or further answer to said complaint.

(Signed) MALONY & COBB,
Attorneys for Defendant.

[Endorsed]: No. 23A. In the United States District Court for Alaska, Division No. 1, at Juneau. Henry Muset, Admr. of the Est. of Edward Hegman, Dec'd, Plaintiff, vs. The Alaska United Gold Mining Co., a Corp., Defendant. Special Answer. Filed Dec. 28, 1900. W. J. Hills, Clerk. Malony & Cobb, Attorneys for Defendant.

And on the same day the plaintiff filed his motion as follows:

In the United States District Court for Alaska, Division No. 1 at Juneau.

HENRY MUSET, Administrator of the Estate of Edward Hegman, Deceased,
Plaintiff,

vs.

THE ALASKA UNITED GOLD MINING COMPANY (a Corporation),
Defendant.

Motion for Order of Default.

I.

Comes now the plaintiff above named, and moves the Court for an order of default and judgment against the defendant for want of an answer.

II.

For the reason that the pleading filed by the defendants marked special answer states no facts which tend to constitute a defense to plaintiff's complaint.

(Signed) W. E. CREWS,
Attorney for Plaintiff.

[Endorsed]: No. 23A. In the District Court for The District of Alaska, Division No. 1. Henry Muset, Admr. of the Estate of Edward Hegman, Plaintiff, vs. The Alaska United Gold Mining Co., a Corporation, Defendant. Motion. Filed Feb. 28, 1900. W. J. Hills, Clerk. W. E. Crews, Attorney for Plaintiff.

Afterwards, on the 31st day of Dec., 1900, the Court made and entered the following order, to wit:

HENRY MUSET, Administrator of the Estate of Edward Hegman, Deceased, Plaintiff,

vs.

ALASKA UNITED GOLD MINING CO., Defendant.

} No. 23A.

Order Denying Motion, etc.

This cause coming on this day to be heard upon the motion of defendant (plaintiff) for judgment herein for want of answer the Court having the argument of W. E. Crews, Esq., in support of said motion and J. H. Cobb, Esq., in opposition thereto, denies said motion, holding the special answer of defendant insufficient under a strict con-

struction of the statute, but allows defendant to plead over, and grants defendant five days from this date within which to answer, counsel for defendant duly excepting thereto.

On January 4th, 1901, the defendant filed its answer, which is as follows:

In the United States District Court for Alaska, Division No. 1 at Juneau.

HENRY MUSET, Administrator of the Estate of Edward Hegman, Deceased,
Plaintiff,

vs.

THE ALASKA UNITED GOLD MINING CO.,
Defendant.

Answer.

The defendant, for answer to the complaint herein, alleges:

I.

It admits the allegations of paragraph I of said complaint.

II.

It admits that Edward Hegman died at Douglas Island, Alaska, on the 9th day of October, 1900; but de-

fendant has no information or belief as to whether he left a mother or sister surviving him and therefore denies the same. Defendant also denies upon information and belief that the said plaintiff is the duly appointed and qualified administrator of the estate of Edward Hegman, deceased.

III.

Defendant admits that on the 9th day of October, 1900, and for a long time prior thereto, the deceased, Edward Hegman, had been in its employ as a miner, operating a machine drill. It also admits that on the said 9th day of October, 1900, said Edward Hegman was killed by an accident in the "700" mine, owned and operated by defendant; but it denies that said accident and death was caused by any negligence of the defendant or its vice-principal; but it alleges the truth and fact to be that the accident causing the death of Edward Hegman was due solely to the negligence and carelessness of the said Edward Hegman, and to the negligence and carelessness of his fellow-servants.

IV.

Defendant denies that the said Edward Hegman did in no way contribute to his said death, or that the same occurred without fault or negligence on his part.

V.

Defendant denies that the death of the said Edward Hegman was brought about through the negligence of the officers and vice-principals of the defendant corporation,

as alleged; but it says that if said accident was due to the negligence of anyone other than deceased himself, it was the negligence of the fellow-servants of deceased.

VI.

Defendant has no knowledge or information as to whether the deceased contributed to the support of his mother, sister, and aunt, and therefore denies the same, and denies that they were dependent upon him. It denies that there was any negligent, wrongful, or unlawful killing of Edward Hegman by the defendant; or that the heirs at law have been deprived of the support and earnings of the said Hegman.

VII.

Defendant denies that the heirs and estate of the said Edward Hegman have been damaged by defendant in the sum of $10,000 or any other sum whatsoever,

Wherefore, defendant prays that it be hence discharged with its costs in this behalf incurred.

(Signed) MALONY & COBB,
Attorneys for Defendant.

[Endorsed]: No. 23A. In the United States District Court for Alaska, Division No. 1, at Juneau. Henry Muset, Admr. of the Estate of Edward Hegman, Dec'd, Plaintiff, vs. The Alaska United Gold Mining Co., Defendant. Answer. Filed Jan. 4, 1901. W. J. Hills, Clerk. Malony & Cobb, Attorneys for Defendant.

On January 11th, 1901, the plaintiff filed his reply, which is as follows:

In the District Court of the District of Alaska.

HENRY MUSET, Administrator of the Estate of Edward Hegman, Deceased,
Plaintiff,

vs.

THE ALASKA UNITED GOLD MINING CO. (a Corporation),
Defendant.

Reply.

The plaintiff in reply to the answer herein alleges that he denies that the death of the said Edward Hegman was due to the negligence or carelessness of the fellow-servants of the said Edward Hegman.

(Signed) CREWS & HELLENTHAL,
Attorneys for Plaintiff.

United States of America,
District of Alaska. } ss.

Henry Muset, being first duly sworn, upon his oath says: I am the plaintiff in the above-entitled action; I have read the foregoing reply and know the contents thereof, and the same is true.

_____.

Subscribed and sworn to before me this —— day of January, A. D. 1901.

_____.

[Endorsed]: No. 23A. In the District Court for the District Court for the District of Alaska, Division No. 1, Henry Muset, Admr., Plaintiff vs. The Alaska United Gold Mining Co., Defendant. Reply. Filed Jan. 11, 1901. W. J. Hills, Clerk. W. E. Crews, Attorney for Plaintiff.

On February 14th, 1901, the jury was selected impaneled, and sworn, who having heard the evidence, the argument of counsel, and instructions of the Court, retired, to consider of their verdict; and afterwards on February 16th, 1901, returned into open court the following verdict, to wit:

The United States of America,
District of Alaska. } ss.

In the District Court of the United States, in and for the District of Alaska, Division No. 1.

HENRY MUSET, as Administrator of the Estate of Edward Hegman, Deceased,
Plaintiff,

vs.

THE ALASKA UNITED GOLD MINING COMPANY,
Defendant.

Verdict.

We the jury impaneled and sworn in the above-entitled cause of action, find for the plaintiff in the sum of ($10,000.00) ten thousand dollars.

(Signed) S. B. AGNEW,
Foreman.

[Endorsed]: 23A. The United States of America, District of Alaska—ss. In the District Court for the District of Alaska, Division No. 1. Henry Muset, as Administrator of the Estate of Edward Hegman, Deceased, Plaintiff; vs. The Alaska United Gold Mining Company, Defendant. Filed Feb. 16th, 1901. W. J. Hills, Clerk. Verdict.

Afterwards on March 16th, 1901, the Court rendered its judgment as follows, to wit:

The United States of America, } ss.
District of Alaska. }

In the United States District Court, in and for the District of Alaska, Division No. 1.

HENRY MUSET, as Administrator of the Estate of Edward Hegman, Deceased,
Plaintiff,
vs.
THE ALASKA UNITED GOLD MINING COMPANY (a Corporation),
Defendant.

Judgment.

This action came on regularly for trial. The said parties appeared by their attorneys, Crews & Hellenthal, counsel for plaintiff, and Malony & Cobb, counsel for the defendant. A jury of twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of the plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of

counsel and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into court, with the verdict signed by the foreman, and, being called answered to their names, and say: "We, the jury impaneled and sworn in the above-entitled cause find for the plaintiff in the sum of ten thousand dollars." Thereafter the plaintiff appeared in open court by his counsel and remitted the sum of seven thousand dollars of the ten thousand dollars to which the jury found the plaintiff entitled to, and offered to take judgment against the defendant for the sum of three thousand dollars. And the defendant's motion for a new trial herein having been heretofore overruled.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered and adjudged and decreed that the said plaintiff have and recover from the said defendant the sum of three thousand dollars ($3,000-00), with interest thereon at 8 per cent per annum, from the date hereof until paid, together with the plaintiff's costs and disbursements incurred in this action, amounting to the sum of seventy-three and eighty one hundredths dollars.

Done in open court this 16th day of March, A. D. 1901.

(Signed) M. C. BROWN,

Judge of the above-named court.

Afterwards the defendant filed its petition for writ of error, which is in words and figures as follows, to wit:

In the United States District Court for Alaska, Division No. 1 at Juneau.

HENRY MUSET, as Administrator of the Estate of Edward Hegman, Deceased,

Plaintiff,

vs.

No. 23A.

THE ALASKA UNITED GOLD MINING CO.,

Defendant.

Petition for and Order Allowing Writ of Error.

The above-named defendant, The Alaska United Gold Mining Co., conceiving itself aggrieved by the judgment in said cause, heretofore rendered on the 16th day of March, 1901, in favor of the plaintiff and against the defendant for the sum of $3,000; besides costs and disbursements, which said judgment and the proceedings incident thereto are erroneous in many particulars, to the great injury and prejudice of your petitioner, the defendant in said suit; that manifest errors have been made in this

cause in the rendering of said judgment as fully appear from the bill of exceptions therein and the assignment of error filed herewith: Now, therefore, that your petitioner may obtain relief in the premises and an opportunity to show and have corrected the errors complained of, your petitioner prays that he be allowed a writ of error in said cause, and that upon the giving by your petitioner of a supersedeas bond, conditioned as by law required that a stay of said judgment be granted pending said writ of error, and that a transcript of the record and all papers in this case, duly authenticated, be transmitted to the Honorable The United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, for the determination of said writ of error.

Dated Juneau, Alaska, April 13th, 1901.

(Signed) ALASKA UNITED GOLD MINING CO.,
Petitioner.

MALONY & COBB,
Attorneys for Petitioner.

Order.

And, now, to wit, on April ——, 1901, it is ordered that the writ of error be allowed as prayed for; and that upon the defendant The Alaska United Gold Mining Co., executing a supersedeas bond, conditioned as required by law with sufficient sureties to be approved by this Court, that the execution of the judgment in said cause be stayed pending said writ of error.

(Signed) M. C. BROWN,
Judge.

[Endorsed]: No. 23A. In the United States District Court for Alaska, Division No. 1, at Juneau. Henry Muset, as Admr. of the Est. of E. Hegman, Dec'd, Plaintiff, vs. The Alaska United Gold Mining Co., Defendant. Petition for Writ of Error and Order of Allowance. Filed April 17th, 1901. W. J. Hills, Clerk. Malony & Cobb, Attorneys for Deft.

And on the same day the defendant filed his writ of error, which is as follows, to wit:

In the United States District Court for Alaska, Division No. 1 at Juneau.

HENRY MUSET, as Administrator of the Estate of Edward Hegman, Deceased,

Plaintiff,

vs.

THE ALASKA UNITED GOLD MINING CO.,

Defendant.

No. 23A.

Writ of Error (Copy).

United States of America—ss.

The President of the United States, to the Judge of the United States District Court for Alaska, Division No. 1, at Juneau, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Henry Muset, as administrator of the estate of Edward Hegmen deceased plaintiff, and The Alaska United Gold Mining Co., defendant, a manifest error hath hapened, to the great damage of the Alaska United Gold Mining Co., as is said and appears by the complaint; we being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the courtrooms of said Court in the city of San Francisco, together with this writ, so that you have the same at the said place on the 10th day of June next, that the records and proceedings aforesaid being inspected, the said Justices of the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right, according to the law and custom of the United States ought to be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 15th day of April, in the year of our Lord, one thousand nine hundred and one, and of the Independence of the United States the one hundred and twenty-sixth.

[Seal] (Signed) W. J. HILLS,
Clerk of the United States District Court for Alaska, Division No. 1.

The foregoing writ is hereby allowed.

(Signed) M. C. BROWN,
Judge.

[Endorsed]: No. 23A. In the United States District Court for Alaska, Division No. 1, at Juneau. Henry Muset, as Administrator of the Estate of Edward Hegman, Deceased, Plaintiff, vs. Alaska United Gold Mining Co., Defendant. Writ of Error. Filed April 17, 1901. W. J. Hills, Clerk. Malony & Cobb, Attorneys for Defendant.

And on the same day the defendant filed his supersedeas bond, which is in words and figures as follows:

In the United States District Court for Alaska, Division No. 1, at Juneau.

HENRY MUSET, as Administrator of the Estate of Edward Hegman, Deceased,
Plaintiff,
vs.
THE ALASKA UNITED GOLD MINING Co.,
Defendant.
No. 23A.

Supersedeas Bond.

Know all men by these presents, that we, The Alaska United Gold Mining Co., a corporation, and B. M. Beh-

rends, and Emery Valentine, all of Juneau, District of Alaska, are held and firmly bound unto the above-named Henry Muset, as administrator of the estate of Edward Hegman, deceased, in the sum of five thousand dollars, to be paid to the said Edward Hegman, etc., for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the 12th day of April, in the year of our Lord, one thousand nine hundred and one. Whereas, the above-named, the Alaska United Gold Mining Company, has prosecuted a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment rendered in the above-entitled action by the United States District Court for Alaska, Division No. 1.

Now, therefore, the condition of this obligation is such that if the above-named, The Alaska United Gold Mining Co., shall prosecute said writ of error to effect, and answer all damages and costs, if it fail to make the said writ of error good, then this obligation shall be void; otherwise to remain in full force and virtue.

(Signed) ALASKA UNITED GOLD MINING COMPANY.

By MALONY & COBB,
Its Attorneys of Record.

B. M. BEHRENDS.

EMERY VALENTINE.

Signed and delivered, and taken and acknowledged this 12th day of April, 1901, before me.

[Seal] HIRAM H. FOLSOM,
United States Commissioner.

Approved by:
M. C. BROWN,
Judge.

[Endorsed]: No. 23A. In the United States District Court for Alaska, Division No. 1, at Juneau. Henry Muset, as Administrator of the Estate of Edward Hegman, Deceased, vs. Alaska United Gold Mining Company, Defendant. Supersedeas Bond. Filed April 17, 1901. W. J. Hills, Clerk. Malony & Cobb, Attorneys for Defendant.

Thereafter and on, to wit, the 7th day of May, 1901, plaintiff in error filed the following motion.

In the United States District Court for Alaska, Division No. 1, at Juneau.

HENRY MUSET, as Administrator of the Estate of Edward Hegman, Deceased,

Plaintiff,

vs.

No. 23A.

ALASKA UNITED GOLD MINING COMPANY,

Defendant.

Motion to Set Aside Writ of Error, etc.

Now comes the defendant and moves the Court to set aside the order heretofore made on the 17th day of April, 1901, allowing a writ of error herein, and to grant the defendant leave to withdraw the petition for writ of error, writ of error, and supersedeas bond filed herein, and for cause shows that said petition, writ, and bond were improvidently filed (but the same were never served) and said order improvidently made, in that the bill of exceptions had not then been settled and filed with the Court, though said bill had been presented to the Court

for approval and filing; that no citation in error has been signed or issued; that the assignment of errors were not and could not be reduced to form and presented therewith until the bill of exceptions were finally settled, and for that reason were not presented therewith; that counsel inadvertantly overlooked the provision of rule two of the Circuit Court of Appeals forbidding this Court granting a writ of error unless assignments of error accompanied the petition for same; that in order to present the questions of law reserved on the trial and embodied in the bill of exceptions clearly to the Appellate Court it is necessary and proper to present a new petition, writ, and bond, accompanied by the proper assignment of errors, as soon as the bill of exceptions is settled and allowed.

MALONY & COBB,
Attorneys for Alaska United Gold Mining Company.

[Endorsed]: Original. No. 23A. In the United States District Court for Alaska, Division No. 1, at Juneau. Henry Muset, as Administrator of the Estate of Edward Hegman, Deceased, Plaintiff, vs. Alaska United Gold Mining Company, Defendant. Motion to Set Aside Writ of Error and to Withdraw Papers. Filed May 7, 1901. W. J. Hills, Clerk. Malony & Cobb, Attorneys for Defendant.

Thereafter, and on the same day, comes the attorneys for the plaintiff and files the following written objection to the foregoing motion and to the allowance and settlement of the bill of exceptions:

United States of America,
District of Alaska. } ss.

In the United States District Court for the District of Alaska, Division No. 1.

HENRY MUSET, as Administrator of the Estate of Edward Hegman, Deceased,
Plaintiff,

vs.

THE ALASKA UNITED GOLD MINING COMPANY (a Corporation),
Defendant.

Exceptions to Withdrawal of Writ of Error, etc.

Comes now the above-named plaintiff and objects to the granting by this Court of leave to the defendant to withdraw the petition, writ of error, and supersedeas bond filed herein, and also objects to the signing and filing of any bill of exceptions in this cause, for the following reasons: 1. The Court has no jurisdiction or power to withdraw or amend the writ of error issued in this cause; 2. Because the judgment in the above-entitled cause was

rendered and entered in this Court during the December term of this Court, which said term ended on the 30th day of March, 1901; that no bill of exceptions were signed, settled, or filed during the said term; that upon the entry of judgment in this cause, to wit, on the 16th day of March, 1901, defendant petitioned this Court, and the Court granted over plaintiff's objection to the defendant, forty days thereafter within which time to present and file his bill of exceptions; that defendant failed and neglected either during said term, or during the time so granted, to settle and file his bill of exceptions herein, nor has he done so at this time though a subsequent term of court, to wit, the April term, has also expired and no bill of exceptions yet been setted and filed in this court; that no further extension of time has ever been applied for or granted; 3. Because the said defendant did on the 17th day of April, 1901, regularly sue out and serve and file in this cause its writ of error, as well as its petition therefor and supersedeas bond, thus taking the case beyond the jurisdiction of this Court.

CREWS & HELLENTHAL,
Attorneys for Plaintiff.

[Endorsed]: In the United States District Court for the District of Alaska, Division No. 1. Henry Muset, as Administrator, etc., Plaintiff, vs. Alaska United Gold Mining Company, Defendant. Exceptions to Withdrawing Writ of Error, etc., and signing Bill of Exceptions. Filed May 7, 1901. W. J. Hills, Clerk. Crews & Hellenthal, Attorneys for Plaintiff.

In the United States District Court for Alaska, Division No. 1, at Juneau.

HENRY MUSET, as Administrator of the Estate of Edward Hegman, Deceased,

Plaintiff,

vs.

ALASKA UNITED GOLD MINING CO.,

Defendant.

No. 23A.

Bill of Exceptions.

Be it remembered that on February 14th, 1901, the above-entitled and numbered cause coming on to be *tried to a* jury, the following proceedings were had, to wit:

A jury having been selected, impaneled, and sworn, and counsel for plaintiff and defendant having made their statement of the case, respectively, the plaintiff, HENRY MUSET, to maintain the issues on his part, was sworn as a witness in his own behalf and testified as follows:

I am the plaintiff. Am thirty years of age. Have been working in the mines; been a miner ever since I was

a kid, about fourteen years old. I was acquainted with Edward Hegman, had known him between twelve and thirteen years. During his lifetime he and I had been partners several times.

Question by counsel for plaintiff: "What relation, Mr. Muset, do you sustain to the estate of Edward Hegman?"

(Counsel for defendant objected to the above question because not the best evidence.)

Answer: "I am his administrator."

By the COURT: "This declaration will not be allowed to stand unless they prove it by the records."

(Continuing witness further testified): "Edward is dead. He was killed on the 9th day of last October at the Seven Hundred Mine, on Douglas Island. I was working with him at the time, and was with him on that occasion. I believe there were about thirty or forty men employed on a shift at the Seven Hundred Mine at that time. There is a stamp-mill in connection with the mine and a tramway. There is about a hundred stamps. The mine known as 'The Seven Hundred' furnished ore to the mill. No other mine furnished ore to it. The Seven Hundred Mine is all under one management."

Question by plaintiff's counsel: "Now, state, if you will, if you know, how the men, the men or the employees, were arranged or graded that are employed in that mine. State to the jury how they are—"

Answer: "Well, there's some men working in the 'glory hole' and some underground in the stopes, and some

in the shafts, and in the blacksmith shop, and hoist, and in the tramway."

Question: "How are those parties that work in the various departments arranged as to whether or not they have foreman?"

Answer: "Well, they generally got a man looking after each gang. He is called shop-boss, or shift-boss, or pit-boss, or so. Those working in the shops or working in the mines, are working under bosses. There's a general foreman or supervisor of all those forces. His name on that occasion was H. B. Pope. Mr. Pope was the man that directs everybody, and told them what to do, and ruled the whole thing, and sent a gang there, and another here, or so. He both employed and discharged men. He gave the men their time checks. I and the deceased, Edward Hegman, were working in the shaft on the 9th day of last October. Jim Pianfetti was with us; he was boss of the shaft and was called shaft-boss. Well, on the 9th day of last October, we went down, the same as usual, in the morning. The night shift blasted some holes and cleaned up the dirt and we found four missed holes from the night shift. We cleaned them out and put new primers into them, and loaded six more and was going to blast them. While we had about two holes to load, I told Ed, I says to him, 'You better go up and tell'—I went up after the iron and went up to the two-sixty level; and I met Pope at the two-sixty level; he came off the skip just as I came on and he asked me, 'Where are you going?' and so I says, 'We are going to blast,' or, that is, he asked me if we were going to blast

and I said yes. I then took the skip and went to the surface, and I was going to have the five bells, from the bottom of the shaft as soon as I went down with the iron, and I was going to have the five bells from the two-sixty level, and because the boys did not have the primers in yet I was to wait. That signal of five bells was to indicate that we were ready to blast, and when I was up there in the blacksmith shop, I stood in the blacksmith shop and asked the blacksmith if the iron was ready and he said yes. So I went into the shaft-house to get the five bells and Mr. Pope came up and told me to take the iron down, the boss was waiting for me. I then went to the blacksmith shop, and got the iron, and then went to the two-sixty level. I then went on the skip, and went on the bucket and asked to be lowered down, and when I came down there I turned around and rang the five bells to the engineer. I rang the five bells for the signal that we were ready to blast. The engineer moved the bucket about three or four feet from the bottom of the shaft and dropped it down again, and that was his signal that he was there and knew what he was doing. Well, Ed cut the fuses and I lighted them with the iron, and threw the iron again to one side, and we jumped on the bucket, and rung one bell to the top; that was for to hoist up; and he raised us a little, and we came back again, and he hollered down that he didn't have a pound of air, and to save ourselves. Jim was standing on the bucket all the time while we was lighting the fuses, and he had the candle, and so when he was told that he didn't have any air we jumped off the bucket again. Well,

Jim dropped the candlesticks, and then we were in the dark, and the only way we had to get out was to get up that cable—it's a quarter-inch cable, steel cable—and I felt around, and of course I could not tell whether Ed was before me or after me, I didn't have any idea, because we was in the dark; anyway I got hold of the rope, and began to climb the pole. I climbed to the skip chute, and swung myself in the timbers, and then Jim began to holler to me and call for help, and I put my hand out and helped him off the timber, and I asked for Ed, and Ed began to holler and tell me to help him. I couldn't do anything. I stood there trying to do something and to tell him to climb the rope, and he was climbing and hollering for help. I couldn't go down the rope, and pack a man up heavier than me. Well, we stayed till the blast went off, and couldn't get hold of the skip. We told the men to ring for the skip, so we had to wait till the blast went off, and finally the skip came down and went from that level to the surface to see what was the matter. I don't know, except from what Nels told me, why there was no air. At the time I went down with the hot iron I examined to see if there was air, and there was then between sixty or sixty-five pounds of air. Ed Hegman was hollering and crying for help. Of course, he was in the dark and couldn't see. When we were first advised that there was no air, Hegman hollered to me that he would try to pull the fuses. I had known Hegman thirteen years. We met first in Michigan, and worked in a mine together there, and out on the railroad, and I went to

Alaska and he came after. We were working together on Douglas Island for a while, and he went away to Unga Island and stopped there a while. He and I were together most of the time and were partners."

Question: "Did he have a mother, sister, or brother living?"

Answer: "They were home, and he told me he had a sister living in this country."

On cross-examination, the witness further testified as follows: "I started to work for The Alaska United Company there the last part of September. Mr. Pope was there then. I've no idea who was superintendent of the mine. No man showed me anything only Pope, or gave me any orders whatever. They told me Mr. Weck was superintendent, but I didn't know it. Mr. Pope was telling me what to do and where to work. He simply directed me in the mine. I have no idea who directed him. I don't know what his relations were to the company except what information I got from others. He hired me. So far as I know there might have been two or three superior officers over him. Hegman and myself shared our profits, earning and expenses. I was not under a contract to share expenses and profits with him —just helped each other. Our business was just mining, working on the railroad and so on. I mean we shared our wages in common and was a partner in that respect. The idea is, that if I was out of work and he was in, I would be helped out by him, and if he was out and I was in, I would help him. We never had any business part-

nership. As a matter of fact, we were both just laboring men. Hegman had worked a whole lot in the mines. He knew all about the risks and dangers attending that sort of work. I couldn't answer for him as to whether he knew the proper steps to take to avoid danger. I had an idea as to how to avoid danger and he had long experience in mines same as I had."

On redirect examination, the witness testified: "During the whole time I was there I never saw any other person but Pope, exercising any supervision, or directing the labors of the gang in the mine, in the tramway, or in any other part of that branch of the company's work."

And to further maintain the issues on his part, the plaintiff next had sworn in his behalf the witness, NELS OLIN, who testified as follows:

"I am acquainted with Henry Muset, the plaintiff. I was acquainted with Edward Hegman in his lifetime. On the 9th day of October, 1900, I was running a hoist at the Seven Hundred Mine, on the third level. I was running that hoist on the 260 level at the time of the accident wherein Edward Hegman lost his life. I am acquainted with H. B. Pope. He was foreman of the mine. No other person, as far as I know, other than H. B. Pope, directed the labor, or acted as foreman of that department of the company's work. I remember the occasion of the accident. We went down to work at seven o'clock in the morning, to shovel off the rock of the other shift—they came down the hoist, and there were five or six buckets of dirt to take off, and some missed holes,

and they commenced to take the bucket down and blast them over again. About eleven o'clock Muset came up for the hot iron and told me that he was ready to blast, and Pope came down in the mine at the same time Muset went up. He asked Muset where he was going, and he said he was going on top for the hot iron. He was there for a while and he rung the five bells in the shaft for the blast. They rung the five bells, and then I had to ring to the surface, but Pope says, 'Never mind; I will go up and tell him.' He went up and Muset came up with the hot iron, and see that the pressure was sixty or sixty-five pounds, and he rung the five bells as fast as he came down, and I lifted the bucket and let it down again, as I always did. I got the signal for the five bells; that is a signal for ready to blast. I then lifted the bucket four or five feet and let it down again. That meant that I was ready to hoist them—that everything was all right. Then he rung one bell, and I hoisted them three or four feet, and see that the air was a failure and let them down again, and then I went up there and told them that the air was gone, and then I didn't see any more of him before he came up, because he was left in the dark down in the shaft. The blast exploded. The next men I see came off the skip chute was Henry Muset and then Jim. And Hegman didn't come out. The men employed in the mine were working in different groups. There was a pit and two stopes, and then a shaft and blacksmith shop and hoist, and tramway—four gangs. Well, some was working in the stopes, drilling, some was

blasting, and some breaking rock, and they had a shift-boss over them to look what they were doing."

Question: "I'll ask you to state to the jury, if you know, whether or not there was a general foreman or superintendent over them."

Answer: "Yes, sir."

Question: "Who was that?"

Answer: "Mr. Pope was the foreman."

Question: "H. B. Pope?"

Answer: "Yes, sir."

On cross-examination, the said witness further testified as follows: "Mr. Weck was superintendent. Mr. Pope was foreman of the Seven Hundred Mine. There were other mines operated by that company, the Treadwell, Mexican, and Ready Bullion."

Question: "By the Alaska United Co.?"

Answer: "The Ready Bullion."

Question: "There was a foreman too, wasn't there?"

Answer: "Yes, sir. Mr. Weck, though, was the general superintendent, so I was told."

And to further maintain the issues on his part, the plaintiff produced and had sworn as a witness, GUY FALCONER, who testified as follows:

"I reside on Douglas Island, and am seventeen years old. On the 9th day of last October I was employed in the Seven Hundred Mine, and was so employed at the time the explosion, that resulted in this case, took place. I was helping Mr. Pope part of the day. He was the foreman of the Seven Hundred Mine. As such foreman, his

duties were to advise the men, show what they were to do, and tell them where to work. The Seven Hundred Mine is a part of the Treadwell department from the Treadwell. It furnishes all the ore for the Hundred Stamp-Mill. That mine was under Mr. Pope's supervision at that time. I saw him that day. The explosion took place about eleven o'clock in the morning. The air at the Seven Hundred Foot Mine was disconnected about that time. About a quarter of eleven Mr. Pope came to me and told me to get the ladder, and I went and got the ladder and he put it against the pipe, and he climbed up and shut the air off. I was standing below holding the ladder for him. He told me to get the wrench so he could uncouple the pipe and I got the wrench, and he and Hoyt unscrewed the pipe, and he went out. That was just a few minutes before the explosion. I seen Henry Muset just before that. He came up for the iron, and I seen him go down with it. The pipe I speak of seeing them disconnect or unscrew was the pipe that furnished air and power for the shaft in which Henry Muset and Ed. Hegman were working."

On cross-examination, the witness further testified as follows: "My age is seventeen. I worked in the mill there about two and a half months. At that time I had been at work about two months. I worked half a month afterwards. Then I quit. A fellow let a bucket down on me a couple of times and I wouldn't work there. Mr. Muset did not ask me to quit. I know that Mr. Pope had supervision of that property, because he instructed the

men, and hired them and discharged them, too. I am sure he hired and discharged them."

Question: "As a matter of fact, he merely, when he got through with a man, sent him to the office?"

Answer: "He gave him papers to the people up there to get his time with."

Question: "That was to show how long he had worked?"

Answer: "Yes, and went to the office and got his time from Mr. Weck."

Question: "He went and took the paper to the office, and they paid him there—is that it?"

Answer: "There's where he got his discharge, or his money, or whatever it is."

Question: "There's where he got his discharge? Don't you know, as a matter of fact, that Mr. Weck was superintendent of that mine?"

Answer: "Yes, sir."

Question: "And that he had supervision of it and not Mr. Pope—isn't that right?"

Answer: "Mr. Pope did all the hiring and discharging."

Question: "Answer my question. Didn't Mr. Weck have supervision of it over Mr. Pope?"

Answer: "Yes, sir."

Question: "Mr. Pope was simply in charge of these men in this particular place—isn't that right?"

Answer: "Yes, sir."

Question: "Now, who hired you?"

Answer: "Mr. Pope."

Question: "And you went to the office to see that the

hiring was approved by Mr. Weck, didn't you, before you went to work?"

Answer: "Before I went to work?"

Question: "Yes, the first thing you did he gave you a piece of paper?"

Answer: "Yes, he gave me a piece of paper and I went down—"

Question: "And it was handed to the general superintendent, wasn't it?"

Answer: "Yes, sir."

Question: "Yes, before you went to work. How came you to say that Mr. Pope had supervision of the mine and the mill, were you instructed to say that?"

Answer: "No, sir."

Question: "It's a fact, however, that Mr. Weck, and not Mr. Pope, had general supervision of it?"

Answer: "I don't know."

Question: "You don't know—if you don't know, why did you say that Mr. Pope had general supervision?"

Answer: "Because I thought he did all the hiring and discharging and was the boss around there."

Question: "That is, right in the mine. And even when he hired anyone, they had to be approved at the office?"

Answer: "All they had to do was to go down and get a check for the boarding house."

Question: "And now you say you don't know whether Mr. Pope or Mr. Weck had charge?"

Answer: "I know that Mr. Pope had charge around the mine. I don't know who had charge of the whole prop-

erty. I was present at the time the air was shut off—was right there, helping Mr. Pope, holding the ladder so it wouldn't fall down. Mr. Pope went up to shut off the air; that's all he done. That is the work he was engaged in at the time. I am sure I was present. My employment in general was a little of everything, packing powder, packing drills, helping the blacksmith, helping run out ore, and clearing up the skips. I was to do anything at all I was put to. I am acquainted with Mr. Tatum. I know where he was at that time. He was in the hoist. The hoist was on the Seven Hundred foot claim, about forty feet from me and Mr. Pope. I don't know whether he could see me and Mr. Pope or not; it would be according to where he was standing. If he was standing behind the drums he couldn't see. If he was standing out to one side he could see. I saw Mr. Tatum every once in a while about that time. He could see me, and I could see him whenever he was not behind the drum. I didn't notice him right when Mr. Pope shut the air off. I wasn't watching him; I was holding the ladder and was watching what I was doing myself. I don't know whether he was looking at Pope and me or not."

On redirect examination, the witness testified as follows: "I worked in the blacksmith shop and carried tools and powder and drills. Mr. Pope had charge of the blacksmith shop, of the hoist, of the men working the elevator, and of the miners and the direction of them. When on cross-examination I said Mr. Pope had charge

of the work right there, I meant the Seven Hundred Mine and the entire mine. Mr. Pope did not work generally in any department around that mine."

And to further maintain the issue on his part, the plaintiff called as a witness, THOS. TATUM, who being first duly sworn, testified as follows:

"I am employed on the hoisting engine at the Seven Hundred Mine, and was so employed on the 9th day of last October. I remember the explosion in question here. I saw Mr. Pope there. Mr. Pope was the foreman of the Seven Hundred Mine at that time. As such, his duties, as I understood it, was to superintend the mine generally under the directions of the superintendent."

Question: "He had the general superintendency of the operations of that mine, though."

Answer: "Yes, sir."

Question: "As such he was your superior, did he direct you?"

Answer: "Yes, sir."

On cross-examination, the witness further testified as follows: "At the time of the accident I was in charge of the hoist. I could see Mr. Pope; I was out on one side and seen him cut the air off. Mr. Pope turned off the air that afforded power to the Seven Hundred shaft on that day. There was with him Mr. Hoyt and Mr. Hoyt's helper. I have forgotten his name. I didn't notice Mr. Falconer. I did not see him there. I presume he was around the mine some place—he was generally employed around different places. I didn't see him at work with

Mr. Pope cutting off the air. If he had been there, I could have seen him. Mr. Pope was foreman in the mine under Mr. Week—that's the way I understood it; yes, sir. I know that Mr. Week was superintendent of the mine and had entire charge and control of it. Mr. Pope was simply a foreman in this particular mine. The Alaska United Company is also operating the Ready Bullion, as I understand it. Mr. Pope was not foreman at that mine. He wasn't foreman of the general business of the Alaska United Company either. He wasn't foreman of the mill. There was another foreman in charge of that, the same as Pope was in charge of this particular mine. The master mechanic had charge of the mechanical part, of course."

Question: "And the master mechanic had general charge of the machinery, as well as of the pipes?"

Answer: "No, sir; I don't think he has anything to do with the piping unless he was called on from the shopmen for that purpose."

Question: "The pipes, and the pressure furnished, the compressed air, was under the supervision of the master mechanic, who was also a foreman in your department?"

Answer: "I really can't say about that. The man they hire, however, is generally competent to do that kind of work around the mine."

On redirect examination, the witness further testified as follows: "So far as I knew, for the various departments in running that mine, they employ such men as are usually competent for the positions they occupy. The

men employed in the various departments of the Seven Hundred Mine, such as blacksmiths, engineers, miners, and drill men, were under Mr. Pope's immediate supervision, as I understood it."

On recross-examination, witness stated that Mr. Pope was under Mr. Weck, as he understood it.

On redirect examination, witness stated that Mr. Weck had general supervision—that is, was the general superintendent of this mine and mill, as well as the Ready Bullion Mine and Mill, and had general supervision over all of them.

And to further maintain the issues on his part, the plaintiff, HENRY MUSET, being recalled, testified as follows:

"On the 9th day of last October I was down at the mine at the time of the explosion. The last time I saw Edward Hegman alive was when he stepped on the bucket. The next time I saw him was when I went down in the shaft after him. He was then dead—blasted to pieces. I removed the corpse from the shaft. He was killed by that explosion. He was about thirty years of age, and a big, strong man—about one hundred and eighty pounds' weight, and healthy; I never knew him to be sick."

On cross-examination, the witness testified as follows, counsel, by permission of the Court, examining him regarding his testimony when first on the stand:

Question: Mr. Muset, you stated yesterday that you didn't know whether Mr. Weck was superintendent or not? A. Yes, sir.

Q. Now, isn't it a matter of fact that some time in September you applied to him as superintendent of the Alaska United Gold Mining Company to get a contract to sink this identical shaft as an independent contractor?

A. No, sir; that isn't a fact. I put in a contract and gave it into the hands of Pope.

Q. Isn't it a fact that Mr. Weck posted a notice there and signed it as superintendent of the Alaska United Company, calling for bids for the sinking of this shaft?

A. I don't remember of reading that notice whatever.

Q. You don't remember of reading the notice?

A. No, sir.

Q. Didn't you afterward come to him and have an interview with him in regard to the sinking of that shaft?

A. Yes, sir.

Q. And you went to him as supertendent, to let the work if it was to let?

A. I went to see him, yes, sir, and—

Q. Answer my question. A. Well?

Q. Didn't you go to him as superintendent of the mine to get that contract?

A. I can't tell you whether he was superintendent or not. I went to him to get the chance.

Q. Didn't you go to him as superintendent?

A. No, sir, I didn't.

Q. Then how came you to go to him at all?

A. I was told that he was the man that had charge of that mine.

Q. And you went to him as the man in charge of it, didn't you? A. Yes, sir.

Q. And you knew he had charge of it, didn't you?

A. Only what people told me about it.

Q. And you put in a bid for that work, didn't you?

A. Yes, sir.

Q. And didn't Mr. Weck—didn't you afterward, after you put in your bid, go to Mr. Weck and inquire as to whether you were going to get that contract or not?

A. Yes, sir.

Q. And he told you the bids were too high, and he was going to have it sunk by pay by the day?

A. Yes, sir.

Q. And then you were employed by him to sink that shaft, were you not? A. No, sir.

Q. About what time was that—what month, if you know? A. In September, sometime.

Q. Just before you began work on that shaft?

A. Yes, sir.

Q. And you were hired to work on that by Mr. Weck?

A. No, sir.

Q. Your wages were increased fifty cents a day while you were working in the shaft? A. Yes, sir.

Q. Who did that? A. Pope did.

Q. He did—or did Mr. Weck?

A. I never seen Mr. Weck. When I went to work I got a slip of paper from Mr. Hoyt and went to the office, and he gave me a note to the boarding house.

Q. That was immediately before you went to work?

A. Yes, sir.

On redirect examination, the witness testified as fol-

lows: "I never saw Mr. Weck about that shaft there in my life. Not as long as I was around there. He never gave any directions around there. I stated that people told me Mr. Weck was superintendent of that mine. That included other mines, the Ready Bullion as well. Mr. Corbus, as I understood it, was superintendent over the Treadwell mine."

And to further maintain the issues on his part, the plaintiff next called as a witness, J. J. C. BARBER, who, being sworn, testified as follows:

"Am postmaster at Juneau. Before that was general agent for the New York Life Insuarnce Company up here. Have been in the life insurance business eleven years, and am familiar with the rules and regulations of life insurance business. They have a table called the mortality table. I have it here; this is one of the tables of mortality with the death rate per thousand, and the expectation of life. The expectancy of life is the average life a large number of persons have yet to live—that is, the average number of years they have yet to live. From these tables a man with good health, thirty years of age, has a life expectancy of 35.33 years. (The following portion of the tables mentioned by witness was then read: Age, 30; number living, 85,441; deaths each year, 720; death rate per 1,000, 843; expectation of life, 35,33.)"

On cross-examination, the witness testified as follows:

Q. Mr. Barber under the rules of life insurance companies, does the occupation or calling in life of the person make any difference as to the life expectancy or the risk assumed?

A. The only way I could answer that, Mr. Cobb, is this: With the New York Insurance Company we don't make any higher charge, no matter what business he is in. The rate is the same for a miner in Treadwell as for a banker or clerk, the same rate exactly. One or two companies make an excessive rate on miners generally. That is considered an extra hazardous employment with other companies, I suppose. The New York Life Insurance Company does not make the same rate in miners as in others as a matter of advertisement; it figures on the whole proposition, and they figure they can take the miners at the regular rates, the same as they do anybody else. But some of the companies make an extra rate, regarding that employment as extra hazardous. I have not especially any tables showing the life expectation of a miner engaged as this man was. I understand that this table covers all classes and conditions—and this is the only table I have. I couldn't say from this table, if this was an extra hazardous occupation, what the life expectancy would be; only, as I understand it, the American tables of mortality is the experience of different insurance companies from a hundred and fifty to two hundred years, from all the life insurance written in the world has taught, and when they take a certain class of men in a hazardous occupation, whether that lowers the rate, I don't know; but this goes back two hundred years, and covers all kinds of cases. The New York Life Insurance Company will insure a miner for any amount without any restrictions whatever. I don't know about other companies.

On redirect examination, the witness testified as follows: "All insurance companies base their insurance on that table."

And to further maintain the issues on his part, the plaintiff, HENRY MUSSET, was again recalled and testified as follows: "Hegman, at the time of his death, was getting three dollars a day and his board."

On cross-examination, the witness further testified as follows: "He was getting extra wages at that time because of the nature of the work he was engaged in. I don't know what were his savings from his daily or monthly earnings. He was drinking once in a while. He went in a saloon and went out."

Q. He used to frequently get drunk, didn't he?

A. I don't know if I have ever seen him drunk—that is, that he didn't know what he was doing or so—that is, I never seen him disorderly.

Q. Didn't you see him drink?

A. Well, I didn't see him drunk; that is, drunk that he would do anything out of the way; he was always behaving himself.

Q. He didn't misbehave himself, then, when he got drunk?

A. Yes, he behaved himself. Went out and in a saloon, and didn't bother anybody.

Q. But answer the question, as to whether you didn't see him drunk?

A. Well, how is a man when he's drunk; what do you mean by drunk?

Q. I mean drunk. You don't mean to tell this jury that you don't know what drunk means?

A. Yes; I know what drunk means.

Q. Did you ever see Hegman drunk?

A. Well, let me explain what I mean by drunk.

Q. Answer my question first, and then explain.

A. Yes, I have seen him drunk.

Q. And he drank often, didn't he?

A. When he got a partner, I suppose; he would generally go in a saloon and go out again all right.

Q. Did he spend whole evenings frequently, drinking and carousing; lots of evenings for hours in a saloon, drinking?

A. He might for all I know; I haven't been with him all the time.

Q. Haven't you seen him when you were with him?

A. Yes, sir.

Q. And stayed in a saloon for hours that way?

A. Yes, once in a while, I guess.

Q. Blowing his money and drinking? A. Sure.

Q. And he would do that pretty frequently, wouldn't he?

A. It was whole weeks that we wasn't together at all in a saloon.

Q. Then there would be weeks you would be there most of the time, wouldn't there?

A. Well, you might say he lived in a saloon—it was a hotel; and we would sit in the barroom together.

Q. And would be there all the time for weeks at a time, wouldn't you?

A. Just live in the hotel there, and sit in the barroom.

Q. (By the COURT.) Mr. MUSET, you stated yesterday that yourself and the dead man had been partners a number of years? A. Yes, sir.

Q. Do you wish to be understood as saying, then, that being a partner of his and dividing his earnings, that you don't know anything about what he saved from his labor from day to day?

A. Well, you know, I never had—he never showed his letters, and only what I can say he told me. I have no source to find out.

Q. I'm not asking you that; you was asked what, if anything, this man saved from his daily earnings. If you was his partner and shared with him in your own wages and his, you know what he saved, don't you?

A. What was the question?

Q. Do you know what this man saved from his daily earnings?

A. Not exactly the amount; I couldn't say. All I have to say for that is his word, what he told me he done with his money, this and that, and what he got on payday. That's the only answer I can give on that. His papers and letters and anything what he would send away I might have found, but I never found any papers.

Q. Did he divide anything with you—any portion of his daily or monthly earnings?

A. Yes, I have got money from him, when I didn't have it.

Q. Well, what do you mean by this partnership—what kind of a partnership?

A. Well, acquainted, and traveling together, and had known each other for a long time; and when one was out of money the other would loan him, and so on.

Q. And if the other was out of money, that one who had the money would loan it—is that all you mean by partnership?

A. Yes, sir, we had both been together, just working for our living.

Q. And were friends, and accommodated each other with loans—is that the substance of it?

A. Yes, sir, the whole substance.

On redirect examination, the witness testified further as follows: "Hegman and I did not go to the Yukon over the same trail. He came in by St. Michael's and I came over the Pass. Mr. Hegman did not lose any work by reason of his drinking that I knew of. I never saw him drunk while on duty. His sitting in the hotel as I have stated was not due to intoxication."

On recross-examination, the witness testifies as follows:

Q. You stated a moment ago that he sometimes spent a week at a time around the saloons, didn't you?

A Well, that was going out and coming in the saloon I would see.

Q. Wouldn't he be on a spree there, and stay there the whole time and be in and out, for weeks at a time?

A. Well, if he hadn't work—

Q. Answer my question.

A. Yes, I have seen him for weeks around that saloon.

Q. Staying there drinking?

A. I don't know that; he was just sitting about the bar.

Q. Would he be at work when he was on these sprees of drinking for weeks at a time?

A. When he was working, I didn't see him in a saloon. He was at work every day.

Q. When you saw him in a saloon was he at work?

A. No, he was not.

On redirect examination, the witness testified as follows:

Q. Mr. Muset, how long have you ever seen Hegman on a spree, if at any time—if you ever saw him on a spree?

A. I haven't seen him on what I call a spree.

Q. When he was in a saloon there, what kind of a saloon was that?

A. I haven't seen him in a saloon; have seen him sitting around from one place to another, and sometime live in a hotel and saloon, sitting in the barroom.

Q. Living in the hotel there?

A. Yes, sir, sitting in the hotel.

Q. Was the saloon then in connection with the hotel?

A. Yes, in the same house.

Q. Was that the reason he was there?

A. Well, he used to hang around the barroom there most of the time, sitting in the bar.

Q. Would Mr. Hegman get intoxicated or drunk at the time? A. I never seen him what I call drunk.

Q. He took a drink once in a while? A. Yes, sir.

Q. (By the COURT.) Now, Mr. Muset, you may explain what you call drunk.

A. I call it drunk when a man don't know what he's about.

Q. Before he's drunk he must have so much whisky in him as to make him unable to understand what he's doing?

A. When I see a man on the street that can't handle himself, I know he's drunk. But if I see a man that walks the street and minds his business, I can't call him drunk. That's my idea. And I have never seen him drunk under that definition of the term.

And to further maintain the issues on his part, the plaintiff next offered in evidence certified copies of the following papers, to wit:

1st. Petition for letters of administration upon the estate of Edward Hegman, deceased.

2d. Order appointing administrator.

3d. Oath of administration.

4th. Letters of administration.

5th. Bond of administration.

To which evidence the defendant objected because said documents showed that the petition was subscribed and filed on the 21st day of November, 1900; that the order granting same was made on the same day, showing that it was impossible for notice or process to have issued so as to give the Court jurisdiction, consequently the whole proceeding is void.

But the Court overruled said objection and permitted said papers to be read to the jury, to which ruling of the Court the defendant then and there objected.

Said papers were as follows:

Plaintiff's Exhibit "A."

In the Probate Court at Douglas, District of Alaska.

In the Matter of the Estate of EDWARD HEGMAN, Deceased.

Petition for Appointment of Administrator.

To the Honorable Judge of the said Court:

Your petitioner respectfully shows:

1. That he is a resident of Douglas Island, in the District of Alaska, more than twenty-one years of age, and one of the principal creditors of Edward Hegman, deceased.

2. That said deceased at the time of his death was a resident of Douglas Island, in the District of Alaska.

3. That the said deceased died intestate, at said Douglas Island, in the District of Alaska, on the 9th day of October, 1900, by being killed in the mines of the Alaska United Gold Mining Company, and the only estate left by the deceased consists of a right of action inuring to his administrator and personal representatives for his death.

4. That the said deceased had no relatives, heirs, or next of kin residing in the District of Alaska.

5. That the said deceased at the time of his death was indebted to several persons in the District of Alaska, but principally to your petitioner, and as such principal creditor and as the time has fully expired for those having precedence in the matter of the administration of

the deceased's estate, your petitioner is advised and believes is entitled to letters of administeration of said estate. That due search has been made to ascertain if deceased left any will and testament, but none had been found.

Your petitioner prays that letters of administration of the said estate of the said deceased issue to this petitioner as provided by law.

(Signed) HENRY *MUSETH.*

United States of America,
District of Alaska. } ss.

Henry *Museth,* being first duly sworn, upon his oath says: I have read the foregoing petition and know the contents therof, and the same is true.

HENRY *MUSETH.*

Subscribed and sworn to before me this 21st day of November, 1900.

[L. S.] L. R. GILLETTE,
United States Commissioner and Notary Public.

[Endorsed as follows]: In the United States Commissioner's Court at Douglas. In Probate. In the Matter of the Estate of Edward Hegman, Deceased. Petition for Appointment of Administrator. Filed November 21st, 1900. L. R. Gillette, Com'r, etc.

United States of America, }
District of Alaska. } ss.

Henry Museth, being first duly sworn, upon his oath says: I have read the foregoing petition and know the contents thereof and the same is true.

HENRY MUSETH.

Subscribed and sworn to before me this 21st day of November, 1900.

[L. S.] L. R. GILLETTE,
United States Commissioner and Notary Public.

In the Probate Court at Douglas, District of Alaska.

In the Matter of the Estate of EDWARD HEGMAN, Deceased. }

Order Appointing Administrator.

This matter now coming on for hearing on this 21st day of November, A. D. 1900, upon the petition of Henry Museth, principal creditor of the deceased, for letters of administration upon said estate, and the Court having heard the proof in support of said petition, and being now fully advised in the premises, doth find all of the allegations of the petitioner to be true, and as a conclusion of law finds that said petitioner is entitled to letters of administration upon said estate.

Wherefore, it is considered, ordered, and adjudged that Henry Museth be, and he is hereby, appointed ad-

ministrator of the estate of Edward Hegman, deceased, and it is further ordered that upon takinge the oath of office and filing a bond as provided by law in the sum of one hundred dollars, that letters of administration upon the estate of Edward Hegman, deceased, issue to said Henry Museth, as administrator.

Dated November 21st, 1900.

[L. S.] L. R. GILLETTE,
Probate Judge.

Filed November 21st, 1900.

In the Probate Court at Douglas, District of Alaska.

In the Matter of the Estate of EDWARD HEGMAN, Deceased.

Oath of Administrator.

United States of America, District of Alaska. } ss.

Henry Museth, being first duly sworn, upon his oath says: I am a resident of Douglas Island, in said District of Alaska, and more than twenty-one years of age. I will support the Constitution of the United States and the laws thereof and the laws of Alaska, and will perform the duties of the trust imposed upon me by reason of my appointment as administrator of the estate of Edward Hegman, deceased, faithfully and according to law.

(Signed) HENRY MUSETH.

Subscribed and sworn to before me this 21st day of November, 1900.

L. R. GILLETTE,
United States Commissioner and Notary Public.

Filed Nov. 21st, 1900.

United States of America, } ss.
District of Alaska.

In the Probate Court at Douglas, District of Alaska.

In the Matter of the Estate of EDWARD HEGMAN, Deceased.

Bond of Administration.

Know all men by these presents, that I, Henry Museth, as principal, and M. J. O'Connor, as surety, are held and firmly bound unto the United States of America for the use and benefit of the heirs and creditors of Edward Hegman, deceased, in the sum of one hundred dollars, for the payment of which, well and truly to be made, we do hereby bind ourselves, our heirs, executors, administrators, firmly by these presents.

The condition of the above obligation is such that whereas the said above-bounden principal has been appointed administrator of the estate of Edward Hegman, deceased, now, therefore, if he shall faithfully perform the duties of his trust as such administrator, according

to law, then this obligation to be void, otherwise to be of full force and effect.

Dated this 21st day of November, 1900.

(Signed) HENRY *MUSETH.*
M. J. O'CONNOR.

The above bond and surety thereof approved this 21st day of Nov., 1900.

L. R. GILLETTE,
United States Commissioner and Probate Judge.

United States of America,
District of Alaska. } ss.

M. J. O'Connor, being first duly sworn, upon his oath says: I am the surety above named and I am worth the sum of one hundred dollars over and above my just debts and liabilities in property, exclusive of property exempt from execution.

(Signed) M. J. O'CONNOR.

Subscribed and sworn to before me this 21st day of November, 1900.

[L. S.] L. R. GILLETTE,
United States Commissioner and Notary Public.

Filed Nov. 21st, 1900.

In the Probate Court at Douglas, District of Alaska.

In the Matter of the Estate of EDWARD HEGMAN, Deceased.

Letters of Administration.

To All Whom These Presents Shall Come Greeting:

Know ye, that it appearing to the undersigned, United States Commissioner at Douglas, Alaska, and ex-officio Judge of the Probate Court thereat, that Edward Hegman died intestate, leaving at the time of his death property in this District, I have duly appointed Henry Museth, administrator of the estate of said Edward Hegman; this, therefore, authorizes the said Henry Museth to act as administrator of the estate of Edward Hegman, deceased, according to law.

In witness whereof I have hereunto subscribed my name and affixed my official seal this 21st day of November, A. D. 1901.

[L. S.] L. R. GILLETTE,

United States Commissioner and ex-officio Judge of the Probate Court at Alaska.

United States of America, } ss.
District of Alaska.

I, L. R. Gillette, United States Commissioner, residing at Douglas, Alaska, and ex-officio Judge of the Probate Court, at Douglas, Alaska, do hereby certify that the

foregoing six sheets, in the order in which they are hereto annexed, are full and true copies of the petition for letters of administration, bond of administration, order appointing administrator, oath of administrator, filed, and made and issued in said Probate Court on November 21st, 1900.

Witness my hand and official seal this 13th day of February, A. D. 1901.

L. R. GILLETTE,

United States Commissioner and ex-officio Judge of the Probate Court of Alaska.

And thereupon the plaintiff closed his case in chief.

And the defendant, to maintain the issue on its part, called as a witness C. A. WECK, who, being duly sworn, testified as follows:

"My name is C. A. Weck; I reside at Douglas Island, and resided there during last October. I know the defendant, the Alaska United Gold Mining Company, Edward Hegman, and the plaintiff, Henry Muset. During last October, and prior to that time, I was superintendent of the Alaska United Gold Mining Company, the defendant. The mining department consists of what is known as the Seven Hundred Foot Claim and the Ready Bullion Claim and in connection with these mines and two mills. I was not appointed in writing to my position. My duties as superintendent of this property in a general way, was to conduct the mining business for the company on Douglas Island; it was to see that the work that I wished to accomplish was carried out, and giving

instructions for such purpose. I was the head of the business in Alaska. I know Mr. H. B. Pope. He was employed in the Seven Hundred Mine at that time. He was foreman of the mine at the Seven Hundred Foot claim. There were two mining foremen and two mill foremen under me. There was a foreman for each mine, and a foreman for each mill operated. In addition to that, we had a master mechanic to look after the machinery when it needed extensive repairs, and he was under my orders for everything that would require some work to repair. Of course, minor repairs were done right at the mines by the miners themselves. Mr. Pope and these other foremen were under my supervision and control. Their duties and authority with reference to the business of the Alaska United Gold Mining Company were to carry out my orders; if they didn't do that they wouldn't have been there. They were employed by the superintendent, and were subject to be discharged by the superintendent. The had no authority other than that delegated to them by the superintendent. In regard to hiring and discharging men, our system is when a man wants a job he goes to the foreman, and if the foreman in that department wishes a man he gives him a card to the office. This card is taken to the office, the general office of the company. If the man is satisfactory, he is required to sign the rules of the company, and is placed on the payroll. If not, he is told he can have no job. It is the same way with reference to discharging them. Generally, of course, we comply with the wishes of the foreman. When they request that a man be discharged, we

generally comply with their wishes, except in cases where we know there's been injustice; in that case, of course, the foreman's wish is overruled. The foreman's authority is simply to recommend. That was the position occupied by Mr. Pope and the authority he had during the month of last October. I remember the beginning of the work on the shaft in which the accident to Hegman occurred. I first determined to have the shaft sunk some time in August. A little later I made an arrangement to take bids for the sinking of the shaft by contract. I received about eight bids for the work. Among them was a bid from Museth and one from Hegman. I had a conversation with Museth about it. I did not let the contract for the sinking of the shaft, and determined to sink it by day's pay. There was an increase in wages to the men working in this shaft, because a miner takes more of a risk in sinking a vertical shaft than in working in stopes in a mine. I have been in the mining business about eight years. There was a hoist furnished and a chain ladder furnished the men engaged in sinking this particular kind of a shaft, to get out of the mine after the blasts were fired. In sinking a vertical shaft it is always the custom to have a chain ladder in the shaft in addition to the other means of escape. These ladders are made of chains and cross bars of iron. They are made of chains for the reason that rock being blasted won't injure them as much as they would wooden ladders. These ladders are supposed to be let down from the lowest set of timbers to the bottom of the shaft, so in case there is any stoppage of the engine in hoisting, or

that would cause delay in hoisting the men out, they would have a chance to climb out by the chain ladder. Wherever we are sinking a vertical shaft, we have a chain ladder. It is furnished to the men who are doing the work for the men to use themselves, like any other tools."

On cross-examination, the witnes testified as follows: "There was no chain ladder in the shaft at the time of the accident. I am the superintendent and have control of both the mines and both the mills known as the Seven Hundred and the Ready Bullion, and the Seven Hundred stamp-mill and the other mill connected with the Ready Bullion. I was the general superintendent at the time of the accident. I was the superintendent of the company's works in Alaska, their mines and mills. There was no one who had authority over me in Alaska. I had under my supervision the Ready Bullion Mine and Mill, and the Seven Hundred Mine and Mill, and at each I had a foreman, making four foreman in all. I had a foreman in charge of the mine at the Ready Bullion, and a foreman in charge of the mine of the Seven Hundred. Mr. Pope wa sthe foreman at the Seven Hundred. Under the foreman there are gangs of men working under shift-bosses in the Seven Hundred Mine; and those shift-bosses are to a certain extent, under the direction of the foreman. There is connected with the Seven Hundred Mine a blacksmith shop. There is a tramway there and it is more or less connected with the mine. And there are hoists and engines. Each of these branches have in their charge a skilled party to operate them—the engine,

an engineer, the blacksmith shop, a blacksmith and so on. And all these people are under the immediate supervision of the foreman; and that foreman was Mr. Pope. I couldn't state where Pope is now. He is not at the mines, nor in Alaska. He left Alaska on the 20th of January, I think, after this suit was brought against the company. The general office of the company is on Douglas Island at the store up by the Treadwell mine. That's where the men report. My office is there. I haven't any particular office at the Ready Bullion or the Seven Hundred. The whole of these mines at Treadwell, the Ready Bullion, the Mexican, the Seven Hundred, the Treadwell, and all the rest of them, office from the same general point, the store. And these people when discharged reported there from all these places. The foreman in this mine, orders the miners supplies, the small supplies he needs temporarily. And if there is a temporary break in the machinery, and he has the time and it's not too extensive, it's his duty to repair it, or see that it is repaired. If it's extensive he reports it to me. All small breaks, the men look after themselves."

And to further maintain the issues on it part, the defendant next called as a witness, JAMES PIANFETTI, who being duly sworn, testified as follows:

"My name is James Pianfetti. I am from Italy, residence; I reside now on Douglas Island, and resided there last October, and was then working for the Alaska United Company, of which Mr. Weck was superintendent. Had been at work there then close to three years. I

knew Mr. Muset. I was working with Muset, and Hegman, and Stephen on that date, sinking a shaft. I don't know the first names. Had been at work in the shaft about three weeks—that is, at the time of the accident, we had been at work about three weeks. Hegman and Muset had been at work with me the whole of this time. On the 9th of October, we had got the shaft sunk about 25 feet below the skip chute. There had been a chain ladder provided for that shaft. It was at that time in the blacksmith shop. We three men had received instruction as to the chain ladder from Mr. Pope. He told me to put it down the shaft. I had a conversation with Hegman and Muset about those instructions; we was talking about it so we could blast; we had to put timbers in and then chain ladder. We concluded to put in the timbers and ladder after the blast went off. It was the duty of all of us working there to put down the chain ladder. At the time of the accident the chain ladder was in the blacksmith shop. It had not been removed from there. If that ladder had been in the shaft, Hegman could have got out. Mr. Weck employed me. He is the superintendent of the mine."

On cross-examination, witness testified as follows: "Mr. Weck is superintendent of those properties. That included the Ready Bullion, Ready Bullion Mill, the Seven Hundred, the Seven Hundred Mill, and everything else, Pope was foreman or superintendent in charge of the Seven Hundred Mine. I was not a shift-boss; I was in charge of the crowd that worked in the shaft. I was the boss

over them, and for that reason, Mr. Pope told me to put down that chain ladder. He told me to put it down on the morning of the 9th.

Q. Didn't Mr. Pope ask you what was the reason the chain ladder wasn't put down before?

A. Before the last blast was going to be, yes, and put the chain ladder down in time. He said to put it down.

Q. Mr. Pope told you to do it that way, didn't he?

A. Mr. Pope told me to put it down.

Q. Didn't Pope tell you about eight o'clock that the chain ladder was ready and to put it down at noon?

A. Yes, sir.

Q. Now, Mr. Pianfetti—

A. No, sir; he didn't tell me to put it down at noon—

Q. —air was the motive power of that shaft, wasn't it? A. Yes, sir.

Q. If the bucket was running at all that was a good safe place to work, wasn't it? A. Yes, sir.

Q. Had you ever had a chain ladder there before that?

A. Not since we were there.

Q. Isn't it a fact that the ladder was broken, and wasn't in a fit condition to be put down at all until that morning?

A. There was a whole one to put down.

Q. Down in the blacksmith shop being fixed, wasn't it.

A. Yes, sir. Pope gave me the instructions to put it down. He had authority to give those instructions. I don't know if Muset and Hegman were in the mine when those instructions were given; they wasn't around there

—didn't see them anyway. I can't tell where I first saw them after I had this conversation with Pope. I didn't see them before getting down to the shaft. I think I first saw them when I got down in the shaft. I went down there as soon as Pope told me about it. They were getting ready to blast, shoveling a few buckets of rock, and so.

Q. And then you told them about the ladder business as soon as the blasting was over?

A. We had been talking about that over before—

Q. Well, answer my question. You told them as soon as the blasting was over you would put up some timbers and then put that ladder down?

A. We noticed that before.

Q. You didn't tell them that then at the time.

A. I did not.

Q. You told them nothing about the chain ladder at that time? A. No.

Q. Nothing all that forenoon?

A. I told them—

Q. After the man was dead you told them—that it?

A. No before.

Q. Did Pope ever tell Muset or Hegman about that ladder in your presence?

A. No; *I ain't, was there,* but he told them. They have got a blacksmith working at the mine; and a hoist, a shaft, and another shaft called the "glory hole"; and a tramway and various other things; and different men in charge of these various things, and they were all under Mr. Pope."

On redirect examination, the witness testified as follows: "I suppose Mr. Pope was looking after everything right at the mine there, but Mr. Weck was higher over Mr. Pope. We had the old chain ladder down in the blacksmith shop and Pope told me to put that down for the time. That was when we first started to do the blasting.

Q. When did you speak to Mr. Muset or Mr. Hegman about whether you would put the ladder down or not?

A. Well, it had been talked over to the boys; we says they have a chain ladder down there, but I guess we will wait to put the timbers down. They don't say yes. They didn't said anything.

Q. When was that you had this talk—how long before this accident?

A. Well, this was about a week before, but they was working night shift, Muset and Hegman, and I told them, because I take my orders going in. I was working day shift all the time.

Q. If they had objected to working there without the chain ladder down, would it have been put down?"

(To the above question the plaintiff, by his counsel, objected, because irrelevant and immaterial, which objection the Court sustained and the plaintiff then and there excepted to such ruling. Continuing witness testified as follows:)

"The new chain ladder was finished the day before the accident. I was instructed to put it down on the morning of the 9th. That chain ladder was forty-five feet long.

It took two men to pack it—all they could do. It was in the mine on a set of timbers so far as you could raise your arm, up so far—fastened on the timbers at the top and dropped to the bottom. It wouldn't take two men no time at all—short time to put it in, just the time to take it from the blacksmith shop, and put it on the bucket. The ladder and timbers would be disarranged by the blast. If it's put down too far it would be broken to pieces; of course if it's put down so far as a man could reach up to climb up it's all right. After I was told by Pope to put down the new chain ladder, I never talked with Muset and Hegman about it."

On recross-examination, the witness said: "This ladder was hung on timbers when it was put in, and I was waiting to put the timbers in at noon so I could hang the ladder on them."

And to further maintain the issues on its part, the defendant next called as a witness ROBERT MUSTER, who being sworn testified as follows:

"I reside on Douglas Island. I remember the accident on the 9th day of last October. I was at that time in the employ of the Alaska United Gold Mining Company: I was blacksmith in the Seven Hundred Mine. I remember making a chain ladder. I made it under the instructions of Mr. Pope, the foreman. It was supposed to go down to the bottom of the shaft, being dug by Hegman, Muset and others. I finished the ladder on the evening of 8th of October about five o'clock. I do not recollect any chain ladder in the blacksmith shop at prior to that

time. I believe they had the old one down below. There was another one there. I did not hear any instructions given to Pianfetti, Hegman, or Muset with reference to this ladder. I was told to have done as quickly as possible, and I finished it on the 8th, and told the foreman when it was done."

On cross-examination, the witness testified as follows: "I am the blacksmith at the Seven Hundred Mine. Besides the blacksmith shop they have got a hoist, a shaft, and tramway leading down to the mill. There was a mine foreman there, and then the superintendent over the foreman.

Q. Who was the foreman over that whole branch of the work, the mine itself?

A. Pope. He was the foreman over the blacksmith shop, the shaft, and the hoist. Mr. Pope included them all, I think. My work comes under the foreman Mr. Pope. The ladder I spoke of was completed on the evening of the 8th of October. I rolled it and laid it right close to the door of the shop and it laid there on the morning of the ninth. Mr. Pope was in the shop on the forenoon of the ninth. He was there several times—quite a few times. The ladder rolled up made a bundle about 14 inches wide and a foot or 18 inches high. It would make quite a bundle lying on the floor. I noticed it lying there during the forenoon of the 9th, and if Mr. Pope looked around he would probably seen it."

And to further maintain the issues on his part, the defendant next called as a witness, NELS OLIN, who having been sworn testified as follows:

"I resided on Douglas Island last October and was in the employ of the Alaska United Gold Mining Company; had been working for them twenty-two months. I knew Mr. Hegman and Mr. Muset. I had been employed with them in this shaft in which the accident happened. I don't know anything about any directions being given by Mr. Pope to put down a chain ladder.

By the COURT.—Who did you learn it from—the dead man? Did you ever hear of any directions being given by Pope from the dead man?

Answer. No, sir; not by Mr. Pope.

Q. By the COURT.—Well, who did you hear it from?

A. We passed the remark between us.

Q. By the COURT.—Who?

A. All of us that worked there.

Q. By the COURT.—Who was working there?

A. Henry Muset, and Ed Hegman and Jim.

Q. By the COURT.—What was said about it down there, as near as you can recall?

A. Just a passing remark that they should have a chain ladder down there, that they promised to get one, but it wasn't ready.

Q. By the COURT.—Why was that?

A. Well, Jim said they couldn't get one.

Q. By the COURT.—Said it wasn't ready to put down? A. No, sir.

Q. By Counsel for Plaintiff.—Did the others agree with what was said by them?

A. They were asking several times to get a chain ladder.

Q. It was talked over several times?

A. Yes, sir; just passed remarks.

Q. How long did you work there?

A. In the shaft?

Q. Yes?

A. From—I started the first of December.

Q. In this shaft. How long were you working with these men in this shaft, prior to the accident?

A. Working there from the 23d of September to 9th of October.

Q. Working down in the shaft?

A. No, sir; on the hoist.

Q. How long did you work down in the shaft with these men?

A. I wasn't working down in the shaft at all.

Q. You were working at the hoist? A. Yes, sir.

Q. And you heard the matter talked over about getting this ladder? A. Yes, sir.

Q. Do you know anything about an old ladder being there, any ladder besides the new one?

A. Yes; I know they used to have one in the Glory Hole.

Q. Where was that during this time?

A. I guess that was in the Glory Hole—using it in there."

On cross-examination the witness testified as follows:-

Q. That old ladder was in the Glory Hole at the time of the accident, wasn't it?

A. Yes, sir, I think she was; I don't know; he wasn't there; I didn't see him anywhere.

Q. In this conversation, Jim, the shift-boss—when he told you there ought to be a ladder down there, he said he had been promised one, but it wasn't ready yet, is that it?

A. Yes, sir; they had some such talk about it.

Q. This conversation was a very few days before the accident—just before?

A. Yes, sir; they was passing remarks three or four times about it.

Q. But all the three of four times were shortly before the accident?

A. Yes, sir.

Q. But there has never been a ladder down there?

A. No, sir; not at that time.

Q. Is that a safe place to work in if the air in the shaft and the hoist is in good running order?

A. Yes, sir.

Q. Absolutely safe? A. Yes, sir.

On redirect-examination, the witness testified as follows:

Q. About what time did this conversation take place?

A. We was talking about it in the night shift, and when we come on the day shift.

Q. How long before the 9th—what day of the month?

A. I couldn't tell exactly what night it was.

Q. Now, when they spoke about putting the old ladder down, that was when Mr. Pianfetti spoke about the new ladder they were making, wasn't it?

A. Yes, sir.

Q. That is, the conversation you speak about is the conversation when Mr. Pianfetti spoke about putting the new ladder down?

A. No, I didn't hear that.

Q. Did you say Mr. Pianfetti was on the night shift with you? A. No; he was on the day shift.

Q. He wasn't on the night shift with you?

A. No, sir.

Q. And Hegman and these other men were on the night shift and then afterward changed to the day shift with you? A. Yes, sir.

Q. And the first conversation when you spoke about the necessity of the chain ladder being down there was on the night shift?

A. Yes, sir; we was passing remarks about it, on the night shift.

On recross examination, the witness testified as follows:

Q. And in all these conversations spoken of by Mr. Pianfetti or others was to the effect that they had been promised a ladder, and the ladder would be put down as soon as it was finished, is that right— A. Yes, sir.

Q. And these were had shortly before the accident?

A. Yes, sir.

Q. You don't remember the exact time—but very shortly before. Now, I will ask you, Mr. Olin, whether they ever talked about the old ladder at all?

A. Well, I heard Jim talking about that—give us

the old ladder, and put it down, or something like that.

Q. Was the old ladder any good?

A. I don't know. He was up in the Glory Hole.

Q. That was Jim that said that? A. Yes, sir.

Q. Hegman wasn't there at all when he said that?

A. No; I don't think he was.

And thereupon the defendant rested.

And the plaintiff, in rebuttal, thereupon called the following witnesses who, on their oaths aforesaid, testified as hereinafter set forth.

HENRY MUSET called on rebuttal:

Direct Examination.

Q. Mr. Muset, did you hear all this testimony in reference to a chain ladder being put in the shaft by the witnesses who preceded you—that is, the testimony of Pianfetti here in regard to the chain ladder, here on the stand? A. Yes, sir.

Q. State to the jury what was said or done about that chain ladder so far as you know.

A. This was the day before the accident happened, Jim said we will blast this out and put in a set of timbers, and then take down the chain ladder.

Q. Was anything said about a chain ladder prior to that? A. Not that I know.

Q. Was anything said in the presence of you or Hegman prior to that in reference to a chain ladder?

A. Not that I know of.

Upon cross-examination, the witness testified as follows:

Q. You say that occurred the day before—was that all that was said? A. Yes, sir.

Q. You didn't object? A. To what?

Q. To the chain ladder not being put down at that time.

A. No; I didn't think the chain ladder was ready.

Q. I didn't ask you that. I asked if you objected.

A. No, sir.

Q. Did Mr. Hegman object?

A. Not that I know of.

Q. Do you know whether the chain ladder was ready or not? A. I do not.

GUY FALCONER called on rebuttal.

Direct Examination.

Q. You have been sworn before. State whether you were working in the blacksmith shop of the Seven Hundred Mine on October 9th, 1900.

A. Yes, sir.

Q. Were you working in the shop on that morning?

A. Yes, sir.

Q. State whether you saw a chain ladder there.

A. Yes, sir.

Q. State whether you had heard any conversation with Pope, the foreman, and the shift boss, Pianfetti, in relation to that ladder? A. Yes, sir.

Q. What was that conversation?

A. Mr. Pope told him the ladder was ready and to take it down at noon.

Q. What time of day was that?

A. Somewhere about eight o'clock in the morning.

Q. And the chain ladder, at that time, where was it?

A. In the shop.

Q. The accident occurred just a while before noon?

A. Yes, sir.

Q. State whether or not that chain ladder remained in the shop during the forenoon previous to the accident?

A. Yes, sir.

Q. Where was it laying?

A. Right near the door.

Q. State whether or not Mr. Pope was down during the day.

A. Yes, sir; he was in there during the day.

Q. Was the ladder in a position where he could have seen it from where he was? A. Yes, sir.

Upon cross-examination, the witness testified as follows:

Q. When did you first hear about this conversation?

A. The morning of the 9th.

Q. The morning of the accident?

A. Yes, sir.

Q. You were in the blacksmith shop—what were you doing in there?

A. I was threading some bolts.

Q. Threading bolts? A. Yes, sir.

Q. Are you a blacksmith? A. No, sir.

Q. And then you were holding the ladder, you say?

A. Yes, sir.

Q. And you heard this conversation about eight o'clock? A. Somewheres about eight o'clock.

Q. Don't you know they were working down in the shaft before that?

A. Yes; but they came back up again.

Q. Weren't they down there working at that time?

A. Pianfetti wasn't; I don't know whether anyone else was or not.

Q. You are positive Pope said for him to send it down at noon? A. Yes, sir.

Q. Now, you may state exactly the words, as near as you can?

A. Mr. Pope came in—or rather Mr. Pianfetti came in, and Mr. Pope was standing watching them bolts, and Pope says to Pianfetti; "That there ladder is ready now, and you better take it down at noon," and Pianfetti says, "All right," and turned and walked off.

Q. How long did you stay in the blacksmith shop?

A. Until Mr. Pope came and told me he needed me.

Q. Well, how long was that?

A. I guess about an hour.

Q. Didn't you say Pope stayed there and Pianfetti went off? A. He did.

Q. How did he come back if he stayed there?

A. You asked me when I went away, not when Pope went?

Q. Yes. A. I went about an hour after.

Q. You stayed there an hour threading bolts?

A. Yes, sir.

Q. That would be until nine o'clock. Where did you go then?

A. I went to the hoist and swept a little, and came in there and he came in there and told me to get a ladder so he could shut off the air, which I did.

Q. You got a ladder and put it up?

A. Yes, sir.

Q. That was about eleven o'clock?

A. Yes, sir.

And the above and foregoing was all the evidence in full introduced on the trial of said cause by either party thereto.

And thereupon the defendant made and presented to the Court, the following motion, to wit:

HENRY MUSET, Administrator of the Estate of Edward Hegman, Deceased,

vs.

ALASKA UNITED GOLD MINING CO.,

Defendant.

No. 26A.

Motion.

The defendant requests the Court to instruct the jury to return a verdict for the defendant, because—

1. The evidence conclusively shows that H. B. Pope, whose negligence in cutting off the air is the only negligence, plead or attempted to be proved by the plaintiff, was a fellow-servant of the deceased, Edward Hegman.

2. The evidence conclusively shows that the deceased, Edward Hegman, and the plaintiff, Henry Muset, were guilty of contributory negligence in not putting the chain ladder in the pit, and that but for such contributory negligence, the accident resulting in the death of Edward Hegman would not have occurred.

MALONY & COBB,
Attorneys for Defendant.

Which said motion was by the Court overruled and denied; to which action of the Court, the defendant then and there excepted.

And thereupon the Court charged the jury as follows:

In defining the duties of the master toward the servant, I cannot do better than to use the language of the Supreme Court of the United States:

"A master employing a servant impliedly engages with him that the place in which he is to work, and the tools or machinery with which he is to work, or by which he is to be surrounded, be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter his service he impliedly says to him that there is no other danger in the place, the tools, and the machinery, than such as is obvious and necessary. Of course some places of work and some kinds of machinery are more dangerous than

others; but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits, the master who provides the place, the tools, and the machinery owes a positive duty to his employee in respect thereto. That positive duty does not go to the extent of a guaranty of safety, but it does require that reasonable precaution shall be taken to secure safety; and it matters not to the employee by whom that safety is secured or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty; and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employee or the latter's right to insist that reasonable precautions shall be taken to secure safety in these respects. Therefore, it will be seen that the question turns rather on the character of the act than on the relation of the employees to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is negligence of the master. But if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor.

"But it may be asked, Is not the duty of seeing that competent and fit persons are in charge of any particular work as positive as that of providing safe places and machinery? Undoubtedly it is, and requires the same vigilance in its discharge; but the latter duty is discharged

when reasonable care has been taken in providing safe place and machinery, and so the former is as fully discharged when reasonable precautions have been taken to place fit and competent persons in charge. Neither duty carries with it an absolute guaranty. Each is satisfied with reasonable effort and precaution."

To which instruction, the defendant then and there excepted because not applicable to the issues made by the pleadings and the evidence in that the question of the failure of the master to provide a safe place to work, nor the question of the negligence of the master in selecting competent and fit persons to have charge of any particular work, were not raised either by the pleadings or the evidence.

The Court further instructed the jury as follows:

"If he (meaning Pope) had absolute charge of that particular department, and exercised the powers and duties of the master toward the employees working under him, he was a vice-principal.

"If you find from the weight of the evidence in this case that Pope, the foreman, was the vice-principal of the company or corporation defendant, and that said Hegman lost his life through the careless and negligent act of said Pope, without any negligence on the part of Hegman himself, then you should find for the plaintiff."

To which instruction, the defendant then and there excepted because there was no evidence before the jury upon which to base a finding that said Pope was such vice-principal; but the evidence conclusively showed that he was a fellow-servant.

And the Court further instructed the jury as follows:

"There is some evidence before you in reference to a certain chain ladder ordered to be furnished to the men in sinking the shaft, and that said ladder was a reasonable and proper means used, or to be used, by the men sinking the shaft, whereby they might escape from danger in case of accident to the other machinery and appliances used in hoisting the men from the shaft at such times as blasts were exploded. If you find from the weight of the evidence in this case that said ladder was furnished to the men for their use in this behalf, and through the carelessness and negligence of the men engaged in the work of blasting in the shaft, and that the deceased Hegman was one of these, and that the men could have escaped from impending danger had the ladder been put in place, and they negligently and carelessly failed to put it in place, then this was contributory negligence upon the part of deceased and the other men working with him, such as relieved the defendant from all liability for his death. If, on the other hand, that such ladder was not furnished to the employees, and was not put in place because of the orders of the said Pope, if you find Pope to have been a vice-principal, and that the death of Hegman resulted from the failure to put in said ladder and by the shutting off the air by Pope, or under his orders and direction so that the other machinery and appliances for hoisting the men could not be operated; and you further find that Pope was so acting, in shutting off the air, was exercising duties entrusted to

him as a vice principal of the master, then the defendant is liable for the death of the said Hegman."

To which said instruction, the defendant then and there excepted because the evidence conclusively showed that a chain ladder was furnished the deceased Edward Hegman and the other men at work in the shaft with him, and the Court erred in submitting such question to the jury.

And all the instructions given by the Court in the order given are as follows:

The Court instructs the jury that the credibility of witnesses and the weight to be given their testimony is a matter exclusively for the jury.

The credit of the witness depends largely upon two things: His opportunity and ability to know what occurred, and his disposition for telling the truth as to the occurrence. The statement of a witness having superior opportunities for knowing what took place, and superior intelligence and memory, other things being equal, are entitled to the greater weight before the jury. A witness who is interested in the result of the suit will not always be as honest, fair, and candid in his testimony as one who is not interested, but witnesses are sometimes found whose interest in the suit in nowise affects their truthfulness. But, as before stated, you are the exclusive judges of the credibility of witnesses and the degree of credit to be given their testimony.

It is the duty of the jury to consider the whole of the evidence, and to render a verdict in accordance with the weight or preponderance of the evidence in the case.

Gentlemen of the Jury: The case you are to consider is not an infrequent one in mining affairs. That accidents will occur where powers are set in motion more than ordinarily dangerous to human life, is reasonably certain. The infirmities of human nature are such that accuracy and promptitude in the discharge of all duties are quite rare, and while generally expected, are not often realized in the conduct of affairs.

The employer owes certain duties to the employee, and for the purpose of this case I shall call the employer the master, and the employee, the servant.

While the master owes certain duties to the servant, the servant takes certain risks upon himself. It is said that the general rule of law is now firmly established that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow-servants, in the course of his employment. As a part of his contract of hire, the servant takes all the risks necessarily incident to the employment in which he engages. As the carelessness of fellow-servants is among those risks necessarily incident to the employment, in work more than ordinarily dangerous, it is conclusive that the servant takes this risk as a part of his contract of hire.

In defining the duties of the master toward the servant I cannot do better than to use the language of the Supreme Court of the United States:

"A master employing a servant impliedly engages with him that the place in which he is to work, and the tools

or machinery with which he is to work, or by which he is to be surrounded be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter his service he impliedly says to him that there is no other danger in the place, the tools, and the machinery, than such as is obvious and necessary. Of course, some places of work and some kinds of machinery are more dangerous than others; but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits, the master who provides the place, the tools, and the machinery, owes a positive duty to his employee in respect thereto. That positive duty does not go to the extent of a guaranty of safety, but it does require that reasonable precaution shall be taken to secure safety; and it matters not to the employee by whom that safety is secured or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty; and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employee or the latter's right to insist that reasonable precautions shall be taken to secure safety in these respects. Therefore, it will be seen that the question turns rather on the character of the act than on the relation of the employees to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is negligence of the master. But if it be not one in the discharge of such positive duty, then there should be some

personal wrong on the part of the employer before he is held liable therefor.

"But it may be asked: Is not the duty of seeing that competent and fit persons are in charge of any particular work as positive as that of providing safe places and machinery? Undoubtedly it is, and requires the same vigilance in its discharge, but the latter duty is discharged when reasonable care has been taken in providing such safe place and machinery, and so the former is as fully discharged when reasonable precautions have been taken to place fit and competent persons in charge. Neither duty carries with it an absolute guaranty. Each is satisfied with reasonable effort and precaution."

As has just been stated, the employee, in his contract of hire, takes the risks of the carelessness and negligence of the fellow-servants. It becomes necessary, therefore, to determine who fellow-servants are. The general rule is that those entering the service of a common master, becoming thereby engaged in a common service, are fellow-servants. When the business of the master is of such great and diversified extent that it necessarily separates itself into departments of service, the individuals placed by the master in charge of these separate branches and departments of service and given absolute control therein, may be properly considered, with respect to the employees under them, vice-principals, and sub-representatives of the master as fully and completely as if the entire business of the master were placed by him under one department. And in this connection the Court instructs you that it is not material by what name such

persons are known or designated, whether they are known as foreman, boss, superintendent, or by some other name.

The boss of a small gang, performing work in one particular part of the mine, or the boss or foreman of a gang in charge of a shaft, or in stoping ore, or any other portion of the work of the mine where both or all are engaged in the same common business or enterprise, viz., the business of extracting ore from a quartz mine or lode mine, are not vice-principals of the master in the performance of that work, but are, ordinarily, unless some special power, or some special duty, is entrusted to them, fellow-servants with the other men in the same employment under their direction and control. Such a boss, such an overseer, foreman, or superintendent, is not, as I say, ordinarily the vice-principal, and does not become so by reason of the position that he holds. The claim made by the plaintiff in this case is, that Mr. Pope, the foreman, as he was called, was in charge of a particular department of the business of the master. That being so in charge of a particular department, he occupied toward the other employees working under him in the same department, the position of vice-principal; or, in other words, in that respect he took the place of the master. If he had absolute charge of that particular department, and exercised the powers and duties of the master toward the employees working under him, he was a vice-principal. If he did not have that absolute control, was subject to the control of a superior, had no discretionary

power or authority, and performed duties under the direction of a superior under rules and regulations formulated for his guidance, he was not a vice-principal, but a fellow-servant.

The claim made by the plaintiff in this case is, that the deceased Edward Hegman, was killed in the mine of the defendant company through the negligence and carelessness of H. B. Pope, the foreman, in shutting off the air from the hoist so that the men engaged in blasting at the bottom of the shaft, or that the said Hegman was prevented thereby from escaping from the shaft, and his death resulted thereby. If you find from the weight of the evidence in this case that Pope the foreman was the vice-principal of the company or corporation defendant, and that said Hegman lost his life through the careless and negligent act of said Pope, without any negligence on the part of Hegman, himself, then you should find for the plaintiff. On the other hand, if you find that Pope was not a vice-principal at the time, and was not given the discretionary power or control as to any of the duties of the master toward his employees, or, if you find that Hegman's death was the result of his own carelessness or neglect, you should find for the defendant.

There is some evidence before you in reference to a certain chain ladder ordered to be furnished to the men in sinking the shaft, and that said ladder was a reasonable and proper means used, or to be used, by the men in sinking the shaft, whereby they might escape from danger in case of accident to the other machinery and appli-

ances used in hoisting the men from the shaft at such as blasts were exploded. If you find from the weight of the evidence in this case that said ladder was furnished to the men for their use in this behalf, and through the carelessness and negligence of the men engaged in the work of blasting in the shaft, and that the deceased Hegman was one of these, and that the men could have escaped from impending danger had the ladder been put in place, and they negligently and carelessly failed to put it in place, then this was contributory negligence upon the part of the deceased and the other men working with him such as relieved the defendant from all liability for his death. If, on the other hand, that such ladder was not furnished to the employees, and was not put in place because of the orders of the said Pope, if you find Pope to have been a vice-principal, and that the death of Hegman resulted from the failure to put in said ladder, and by the shutting off of the air by Pope, or under his orders and direction, so that the other machinery and appliances for hoisting the men could not be operated; and you further find that Pope was so acting, in shutting off the air, was exercising duties entrusted to him as a vice-principal of the master, then the defendant is liable for the death of the said Hegman.

Damages that may be recovered for the death of any man caused by the negligent act or acts of another is limited to ten thousand dollars. In considering what, if any, damages the plaintiff is entitled to recover, you will consider his life-expectancy, or, in other words, the number of years he might reasonably expect to live, his earn-

ing capacity, the amount that he could save, or ordinarily did save therefrom, and in excess of the expense of living. There is a difference in the earning capacity of men and therefore a difference in the amount of damages that may be recovered where death results from wrongful acts of others.

You are not to understand that the term of years a man may live and the amount he might earn during that period, less the expense of living, is to furnish a rule or measure of damages. Whatever a man's life expectancy, you all understand that he is liable to die at any moment, and his life to be limited to a few days or years, or it may extend far beyond the limit fixed by the life statement. The life expectancy, as fixed by these tables, is the average life of men in good health and at the age of deceased. It would be presumptuous to claim that the defendant would have lived longer than the average, or that he would live but a few days. But you are to consider this matter of life expectancy as one of the circumstances only upon which to base a calculation of the damages that have been sustained, if any, to the estate of deceased. Was he a man of industry, a man of sobriety? Was he a man that earned an annual sum over and above his expenses of living? Had he constant employment, or did he work but portions of the time, and did his earning exceed his reasonable expenses? These are all matters that may enter into your consideration in determining the damages that may be recovered by the plaintiff in this case, if you find for the plaintiff. You are to return such

damages, if any, as you find the estate entitled to under the evidence in this case.

I am requested by the plaintiff and the defendant to give certain instructions. These I give, and you will consider them as a part of the instructions of the Court; and these are as follows:

The following instructions were thereupon given at the request of plaintiff. Instructions by plaintiff:

"The Court instructs the Jury that, if you find from the evidence that the plaintiff is the duly acting and qualified administrator of the estate of Edward Hegman, deceased, and if you find that the said Edward Hegman was an employee of the defendant corporation, working in their mine, known as the '700 Mine,' as a miner, running and operating what is commonly known as a machine drill, in the underground workings of said mine, on or about the 9th day of October, 1900; and if you find that while the said Edward Hegman and his colaborers were at the bottom of a shaft in said mine, sinking the same, pursuant to the orders and directions of the foreman and vice-principal of the defendant corporation, and that after they had sunk drill holes in the bottom of said shaft and had loaded them with powder and fuse, preparatory to blasting them, and after giving the proper signal indicating their purpose and intention of lighting and firing off said blast, and that after the parties in charge of the hoist had indicated their readiness and ability to hoist the said Edward Hegman and associates out of said shaft and before the said blast went off and exploded; that act-

ing upon said signals and believing in the safety of the regulations, machinery and the workings thereof, the said Hegman and his associates did light said fuses and gave the proper signals to the parties in charge of the elevator to be hoisted to a place of safety; that at the time the air by means of which said elevator was raised was shut off above and that it was impossible for the hoist or elevator to be raised on that account; that the said Edward Hegman made every possible effort to escape death and injury from the explosion of said blast, and that thereupon the said blast did explode, thereby wounding and mangling the said Edward Hegman, then and there causing death of the said Edward Hegman. And if you find that the said Edward Hegman did in no way contribute to his death and that the same occurred without any fault or negligence on his part, and if you find that the death of the said Edward Hegman was brought about by the carelessness and negligence of one H. B. Pope, in causing the air and power to be shut off and disconnected, so that the elevator in the mine in which Edward Hegman was employed could not be raised and hoisted and the said Hegman removed from danger. And if you further find that the said Pope knew, or ought to have known, that at the time he caused said air to be disconnected that the said Edward Hegman was in a place of danger and could not escape without the use of said air, and if you further find that the said Pope was at that time a vice-principal or sub-representative of the company, or a superintendent or foreman in charge of a

separate branch of the said company's business, as explained in these instructions, then the Court instructs you that you must find for the plaintiff in such sum as he proves himself entitled to under the law and the evidence."

The following instructions were thereupon given at the request of defendant:

"If the deceased, Edward Hegman, knew or should have known that the chain ladder spoken of by the witnesses should have been placed in the shaft, as an additional safeguard against the failure of the air hoist to work, and he continued to work in the shaft without the chain ladder being put in, then he assumed all risks arising from a failure of the air hoist and you will find for the defendant.

"The evidence shows in this case that the deceased, Edward Hegman, was a man of about thirty years of age; that he was a laborer, and had been working for himself some eight years or more; that his estate at the time of his death, consisted of nothing but the claim in suit herein.

"Now, if you find and believe from the evidence that the said Edward Hegman from his character, habits, etc., would not probably have left any greater estate at the time of his probable death, had he not died on October 9th, 1900, then you will find for the plaintiff only nominal damages.

"If you believe from the evidence that if the chain ladder, spoken of by the witnesses, had been placed in the

shaft prior to the time of the accident, that Hegman could have climbed said ladder and thus escaped, and if you further believe that the failure to put said ladder in the shaft was due in any manner to the negligence or carelessness of Edward Hegman, and the men working with him in the shaft, then you will find for the defendant."

"In this case, if it is shown that the defendant company furnished a chain ladder for use in the shaft where the accident happened, to give another means to the men working therein to get out, in the event the compressed air hoist should for any reason, fail to work and the evidence shows that the chain ladder was not put in the shaft.

"Now, if you find and believe from the evidence that H. B. Pope ordered or directed this ladder to be placed in the shaft and the deceased, Edward Hegman, knew of this order, and consented and agreed that the ladder should not be put down until after the blast, which happened to cause his death, should be fixed; or if he knew that such order to put in the chain ladder had been given and was being disobeyed, and he continued to work in the shaft, notwithstanding, then the said Edward Hegman assumed all the risk of the air failure to work and he cannot recover in this cause.

"In assessing the plaintiff's damages in this case, you cannot allow anything for the sufferings of the deceased, Edward Hegman, and you are not to consider such suffering in arriving at your verdict; nor can you allow anything for the sorrow, grief, or mental suffering of his relatives or friends. In fixing plaintiff's damages, if any,

by reason of the death of Edward Hegman, you will determine the sum, if any, in which Hegman's estate had been injured by his death; and in determining this question, you will take into consideration his age, the probable length of time he would have lived, his habits, and earning capacity over and above his expenses and all the circumstances in evidence bearing on the question, and allow such sum only as the estate of Edward Hegman, would, in view of all the evidence, reasonably have been worth at the time of his probable death, had he not died on the 9th of October, 1900."

"You will, gentlemen of the jury, consider all of the evidence of the case under the instructions given you by the Court, and when you have agreed upon your verdict, your foreman will sign the same in your presence, and you will return your verdict into Court.

"I hand you, with these instructions, the pleadings in the case and two forms of verdict. You will sign such verdict as in accord with your findings."

And the jury having returned their verdict in favor of the plaintiff and against the defendant for the sum of $10,000, the defendant, on the 18th day of February, 1901, filed its motion for a new trial, which is as follows, to wit:

HENRY MUSET, as Administrator of the Estate of Edward Hegman, Deceased,

Plaintiff,

vs.

THE ALASKA UNITED GOLD MINING CO.,

Defendant.

No. 23A.

Motion for New Trial.

Now comes the defendant, by its attorneys, Malony & Cobb, and moves the Court to set aside and hold for naught the verdict of the jury herein, and grant a new trial of this action for the following reasons, to wit:

I.

For error of the Court in the admission of evidence for the plaintiff objected to by defendant, and duly excepted to as shown in the bill of exceptions.

II.

Errors of the Court in sustaining objections of the plaintiff to competent and material evidence for the defendant, as shown in the bill of exceptions.

III.

For the error of the Court in refusing the request of the defendant at the conclusion of the whole evidence, to return a verdict for the defendant.

IV.

For the errors of the Court in the instructions given as is particularly pointed out in the exceptions taken to this said charge.

V.

Because the verdict of the jury in finding for the plaintiff, in any sum at all, is contrary to, and wholly unsupported by, the evidence in this: 1st. The evidence conclusively showed that H. B. Pope, by whose negligence plaintiff's intestate was killed, was a fellow-servant of the said intestate. 2d. The evidence further conclusively showed that said intestate was a skilled miner, having had years of experience in such work; that he knew a chain ladder was customarily used in shafts such as that in which the accident occurred, to afford the men in such shaft an additional means of egress therefrom; that a ladder for this identical shaft was furnished by defendant, that such ladder was not put in the shaft, and that said intestate either consented to the ladder not being put in or continued the work in the shaft without the ladder and without objection thereto and knowing the danger therefrom, and thereby was guilty of contributory negligence and assumed all risks of such accidents as that by which he was killed.

VI.

The amount of damages awarded by the jury is grossly excessive, and wholly without support in the evidence, and were manifestly dictated by the irregular conduct of

plaintiff's counsel in his closing, wherein he passionately appealed to the jury to return such a verdict as would stop the defendant from filling the graveyard with men negligently slaughtered in its mine, and teach it the value of the life of a man; and other like prejudicial language, in the use of which said counsel had to be stopped and admonished by the Court three different times.

MALONY & COBB,
Attorneys for Defendant.

And afterwards, on the 16th day of March, 1901, the Court made its order overruling the motion for a new trial, which is as follows, to wit:

The United States of America,
District of Alaska. } ss.

In the United States District Court for the District of Alaska, Division No. 1.

HENRY MUSET, as Administrator of the Estate of Edward Hegman, Deceased,
Plaintiff,
vs.
THE ALASKA UNITED GOLD MINING COMPANY (a Corporation),
Defendant.

Order Overruling Motion for a New Trial.

This cause coming on regularly to be heard upon defendant's motion for a new trial herein, and the Court

having heard the argument of counsel, and being fully advised in the premises, it appears to the Court that a new trial should not be granted, and that said motion should be overruled upon the plaintiff's remitting $7,000 of the sum for which the verdict was returned.

Now, therefore, it is hereby ordered, adjudged, and decreed that the defendant's motion for a new trial herein be, and that the same is hereby denied and overruled, to which said ruling of the Court the defendant now and here excepts.

Done in open court this 16th day of March, A. D. 1901.

M. C. BROWN,

Judge of the Above-named Court.

And now the said defendant requests forty days in which to reduce his exceptions to writing and present the same for allowance and settlement by the Court, which said time is allowed by the Court.

M. C. BROWN,

Judge.

And inasmuch as the facts aforesaid and the rulings of the Court thereon do not appear of record, the defendant prays that this its bill of exceptions may be allowed, signed, sealed, and filed as a part of the records herein.

MALONY & COBB,

Attorneys for Defendant, The Alaska United Gold Mining Co.

In the United States District Court for the District of Alaska, Division No. 1.

HENRY MUSET, Administrator of the Estate of Edward Hegman, Deceased,
Plaintiff,
vs.
THE ALASKA UNITED GOLD MINING COMPANY,
Defendant.

Order Approving Bill of Exceptions.

The foregoing paper writing, consisting of sixty-six pages of typewritten matter, and marked "Bill of Exceptions," was presented to me for approval on the 15th day of April, 1901, at Skagway, within the District of Alaska, and the First Division thereof, a copy of the same having been delivered to counsel for plaintiffs the 13th day of the same month, and the Judge of said Court was requested to sign, settle, and approve the same without other or further notice.

It being found that the said bill of exceptions as presented was not in all things correct, it was thereafter amended so that the same should conform to the facts,

and being so amended the Judge of said Court now, on this 7th day of May, 1901, over the objection of counsel for the plaintiff—which said objection is in writing—approves and signs the said bill of exceptions and orders that the same be filed nunc pro tunc as of the 15th of April, 1901, and made a part of the record in the case.

(Signed) MELVILLE C. BROWN,
Judge.

Bill of exceptions endorsed as follows: 23A. In the United States District Court for Alaska, Division No. 1, at Juneau. Henry Muset, as Administrator of the Estate of Edward Hegman, Deceased, Plaintiff, vs. Alaska United Gold Mining Company, Defendant, Bill of Exceptions. Filed May 8, 1901. W. J. Hills, Clerk. Malony & Cobb, Attorneys for Defendant. Filed as of April 15, 1901, by order of Court.

And afterwards, on May 7, 1901, the defendant filed his assignment of errors, which reads as follows:

In the United States District Court for Alaska, Division No. 1, at Juneau.

HENRY MUSET, as Administrator of the Estate of Edward Hegman, Deceased,

Plaintiff,

vs.

No. 23A.

ALASKA UNITED GOLD MINING COMPANY,

Defendant.

Assignment of Errors.

Now comes the Alaska United Gold Mining Company, the plaintiff in error, and assigns the following errors committed by the lower Court in the trial of the above-entitled and numbered cause, to wit:

I.

The Court erred in holding that the special answer alleging the want of legal capacity to maintain this suit, inasmuch as he was not the administrator of Edward Hegman, deceased, was insufficient, and requiring the defendant to answer further.

II.

The Court erred in admitting in evidence to the jury the certified copies of the probate proceedings in the matter of the estate of Edward Hegman, deceased.

III.

The Court erred in sustaining the objection of the plaintiff to testimony of the witness, James Pianfetti, tending to show that if Hegman, the deceased, and the plaintiff had objected to working in the shaft where the accident happened, without a chain ladder, the chain ladder would have been put in.

IV.

The Court erred in refusing the motion of the defendant, made at the conclusion of the whole testimony, to instruct the jury to return a verdict for the defendant.

V.

The Court erred in instructing the jury as follows: "In defining the duties of the master toward the servant, I cannot do better than to use the language of the Supreme Court of the United States: 'A master employing a servant impliedly engages with him that the place in which he is to work, and the tools or machinery with which he is to work, or by which he is to be surrounded, be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter his service he impliedly says to him that there is no other danger in the place, the tools, the machinery, than such as is obvious and necessary. Of

course, some places of work and some kinds of machinery are more dangerous than others; but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits, the master who provides the place, the tools, and the machinery owes a positive duty to his employee in respect thereto. That positive duty does not go to the extent of a guaranty of safety, but it does require that reasonable precaution shall be taken to secure safety; and it matters not to the employee by whom that safety is secured or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty; and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure or obligation to the employee, or the latter's right to insist that reasonable precautions shall be taken to secure safety in these respects. Therefore, it will be seen that the question turns rather on the character of the act than on the relation of the employees to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is negligence of the master. But if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employee before he is held liable therefor. But it may be asked: Is not the duty of seeing that competent and fit persons are in charge of any particular work as positive as that of providing safe places and machinery? Undoubtedly, it is, and requires the same vigilance in its discharge, but the latter duty is discharged

when reasonable care has been taken in providing safe place and machinery, and so the former is as fully discharged when reasonable precautions have been taken to place fit and competent persons in charge. Neither duty carries with it an absolute guaranty. Each is satisfied with reasonable effort and precaution.' "

VI.

The Court erred in instructing the jury as follows: "If he [meaning Pope] had absolute charge of that particular department, and exercised the powers and duties of the master toward the employees working under him, he was a vice-principal."

"If you find from the weight of the evidence in this case, that Pope, the foreman, was the vice-principal of the company or corporation defendant, and that said Hegman lost his life through the careless and negligent act of said Pope, without any negligence on the part of Hegman himself, then you should find for the plaintiff."

VII.

The Court erred in instructing the jury as follows:

"There is some evidence before you in reference to a certain chain ladder ordered to be furnished to the men in sinking the shaft, and that said ladder was a reasonable and proper means used, or to be used, by the men sinking the shaft, whereby they might escape from danger in case of accident to the other machinery and appliances used in hoisting the men from the shaft at such times as blasts were exploded. If you find from the weight of the evidence in this case that said ladder was

furnished to the men for their use in this behalf, and through the carelessness and negligence of the men engaged in the work of blasting in the shaft, and that the deceased, Hegman, was one of those, and that the men could have escaped from impending danger had the ladder been put in place, and they negligently and carelessly failed to put it in place, then this was contributory negligence upon the part of the deceased and the other men working with him such as relieved the defendant from all liability for his death. If, on the other hand, that such ladder was not furnished to the employees, and was not put in place because of the orders of the said Pope, if you find Pope to have been a vice-principal, and that the death of Hegman resulted from the failure to put in said ladder and by the shutting off the air by Pope, or under his orders and direction, so that the other machinery and appliances for hoisting the men could not be operated; and you further find that Pope was so acting, in shutting off the air, was exercising duties entrusted to him as a vice-principal of the master, then the defendant is liable for the death of the said Hegman."

VIII.

The Court erred in refusing to set aside the verdict of the jury and grant a new trial.

And for the errors assigned, and others manifest of record herein, The Alaska United Gold Mining Company, plaintiff in error, prays that the judgment of the lower Court be reversed, and this cause remanded with instruc-

tions to grant a new trial, and on such trial to award a nonsuit.

(Signed) MALONY & COBB,
Attorneys for The Alaska United Gold Mining Company,
Plaintiff in Error.

[Endorsed]: No. 23A. In the United States District Court for Alaska, Division No. 1, at Juneau. Henry Muset, as Administrator of the Estate of Edward Hegman, Deceased, Plaintiff, vs. Alaska United Gold Mining Co., Defendant. Assignment of Errors. Filed May 7, 1901. W. J. Hills, Clerk. Malony & Cobb, Attorneys for Defendant.

Afterwards a citation in error was issued, which with the return thereon is as follows, to wit:

In the United States District Court for Alaska, Division No. 1, at Juneau.

HENRY MUSET, as Administrator of the Estate of Edward Hegman, Deceased,

Plaintiff,

vs.

No. 23A.

THE ALASKA UNITED GOLD MINING CO.,

Defendant.

Citation (Copy).

United States of America—ss.

To Henry Muset, as Administrator of the Estate of Edward Hegman, Deceased, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the city of San Francisco, on the 20th day of June, 1901, pursuant to a writ of error, filed in the clerk's office of the United States

District Court for Alaska, Division No. 1, at Juneau, wherein the Alaska United Gold Mining Company is the plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated May 13th, 1901.

(Signed) MELVILLE C. BROWN,
Judge.

United States,
District of Alaska,
Division No. 1. } ss.

I hereby certify that I received the within citation of error May 20th, 1901, and served the same May 20th, 1901, in Juneau, Alaska, by delivering to W. E. Crews, one of plaintiff's attorneys a certified copy of the within citation, certified to by Malony & Cobb, defendant's attorneys, to the said W. E. Crews personally.

Dated Juneau, May 20th, 1901.

JAMES M. SHOUP,
United States Marshal.
By W. S. Staley,
Office Deputy.

[Endorsed as follows]: No. 23A. In the United States District Court for Alaska, Division No. 1, at Juneau. Henry Muset, as Admr. of the Est. of E. Hegman, Dec'd, Plaintiff, vs. The Alaska United Gold Mining Co., Defendant. Citation in Error. Filed May 20th, 1901. W. J. Hills, Clerk. Malony & Cobb, Attorneys for Deft.

Afterwards the Court made the following order, which was entered of record, to wit:

In the United States District Court for Alaska, Division No. 1, at Juneau.

HENRY MUSET, as Administrator of the Estate of Edward Hegman, Deceased,

Plaintiff,

vs.

ALASKA UNITED GOLD MINING CO.,

Defendant.

Order Extending Time to File Transcript.

Upon motion of Messrs. Malony & Cobb, attorneys for the defendant, and plaintiff in error, it is ordered that the time within which to file the transcript of the record herein in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended until the 20th day of June, 1901.

Dated May 13th, 1901.

(Signed) M. C. BROWN,
Judge.

Clerk's Certificate to Transcript.

The United States of America,
District of Alaska,
Division No. 1. } ss.

I, W. J. Hills, clerk of the United States District Court for the District of Alaska, Division No. 1, do hereby certify that the above and foregoing and hereto annexed ninety-six pages are a full, true and correct transcript of the records and files of all the proceedings in the therein mentioned cause of Henry Muset, as Administrator of the Estate of Edward Hegman, Deceased, vs. The Alaska United Gold Mining Company, as the same appears of record and on file in my office, and that the same is in accordance with the command of the writ of error in said cause allowed, except as to such papers as have been filed after the date thereof.

That this transcript has been prepared by the plaintiff in error and the costs of examination and certificate, amounting to $6.35, has been paid to me by the plaintiff in error.

In testimony whereof, I have hereunto set my hand and caused the seal of Court to be hereunto affixed at Juneau, Alaska, on this 4th day of June, 1901.

[Seal] W. J. HILLS,
Clerk United States District Court for District of Alaska,
Division No. 1.

[Endorsed]: No. 710. In the United States Circuit Court of Appeals for the Ninth Circuit. The Alaska United Gold Mining Company, Plaintiff in Error, vs. Henry Musset, as Administrator of the Estate of Edward Hegman, Deceased, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for Alaska, Division No. 1.

Filed June 13, 1901.

F. D. MONCKTON,

Clerk.

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ALASKA UNITED GOLD MINING CO.,
Plaintiff in Error.
vs.
HENRY MUSET, as Administrator of the Estate of Edward Hegman, Deceased,
Defendant in Error

In Error to the United States District Court for Alaska, Division No. 1.

BRIEF OF PLAINTIFF IN ERROR,

Filed by MALONY & COBB,
Attorneys for Plaintiff in Error.

Daily Dispatch Print, Juneau.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ALASKA UNITED GOLD MINING CO.,
Plaintiff in Error.
vs.
HENRY MUSET, as Administrator of the Estate of Edward Hegman, Deceased,
Defendant in Error

In Error to the United States District Court for Alaska, Division No. 1.

BRIEF OF PLAINTIFF IN ERROR,

Filed by MALONY & COBB,
Attorneys for Plaintiff in Error.

Statement of the Case.

There was an action at law brought by the defendant in Error, Henry Muset, as administrator of the estate of Edward Hegman, deceased, against the plaintiff in Error, the Alaska United Gold Mining Co. to recover $10,000.00, damages, to said estate. The cause of action alleged, was for negligently causing the death of said intestate, and the suit was brought under the provisions of Section 353 part IV of Carter Alaska Code.

The allegations of the Complaint in substance were, that on October 9th, 1900, Edward Hegman, died intestate, and on Nov. 21st, 1900, the plaintiff was duly appointed his administrator. That on the date of his death and for a long time prior thereto, Hegman was, and had been an employee of the defendant Company, working in the Seven Hundred Mine, under the instructions of the foreman of said mine, and the other agents, officers, and vice-principals of defendant in control of that branch and department of the defendant's workings. That, while deceased and his co-laborers, were at the bottom of a shaft, engaged in sinking the same, and after they had sunk drill holes in the bottom of said shaft, and loaded the same with powder and fuse preparatory to blasting, and after they had signalled to the parties, in charge of the hoist indicating their purpose and readiness to blast, and after

the parties in charge of the hoist had indicated by signal that they understood said blasts were about to be fired, and indicated their readiness and ability to hoist deceased and his co-laborers, out of the shaft, after the fuses were lighted, the deceased and his co-laborers lighted the fuses, entered the elevator and signalled to be hoisted out of the shaft, when they were informed that the compressed air, furnishing the power to the hoisting engine, had been cut off at the surface above. Deceased thereupon made every effort to escape from the shaft, but was unable to do so, and the blasts exploded and he was killed. The Complaint denied contributory negligence on the part of deceased and charged gross negligence on the part of the "officers, agents, and vice-principals of the defendant Company in causing said air and power to be disconnected and cut off." It further alleged that deceased was thirty years of age, in good health and prayed $10,000.00 damages. (Printed Rec. pp. 6–10)

The defendant filed an answer in the nature of a plea in the abatement, denying that the plaintiff was the administrator of the deceased, because the appointment was made on the very day the petition was filed, without any notice or process whatever and in a purely ex parte proceeding. (Pr. Rec. pp. 11–13).

In reply to this, plaintiff moved for judgment for want of sufficient answer. (Pr. Rec. p. 14).

The Court overruled the motion, but held the plea insufficient, to which defendant excepted, and required defendant to answer to the merits. (Pr. Rec. pp. 15-16).

Defendant then answered denying that plaintiff was the administrator of Hegman, denied all negligence, and set up that the death of deceased was caused solely by the negligence of his fellow servants and his own contributory negligence. (Pr. Rec. pp. 16-18).

In reply, plaintiff denied contributory negligence and negligence of fellow-servants. (Pr. Rec. p. 19).

The case was tried to a jury, which returned a verdict for plaintiff for $10,000.00. On motion for a new trial the Court required a remitter of $7,000.00 and rendered judgment for $3,000. (Pr. Rec. pp. 21-23 and pp. 105-108). A Bill of Exceptions was saved, Writ of Error sued out, Assignment of Errors filed, Citation in Error served, bond given, and the cause is now here presented for correction and revision.

The Errors relied upon relate to the ruling of the Court on the plea in abatement, the admission of evidence and to the instruction given and refused and these will be presented in their order.

There was no dispute about the facts. The main error relied upon is a very plain one All the evidence is in the record.

The shaft in which deceased lost his life was started to be sunk about three weeks before the accident, and had then been sunk to a depth of 25 feet. (Pr. Rec. p. 73). The defendant owns and operates two mines and two mills, on Douglas Island, Alaska, the Ready Bullion and the Seven Hundred. Mr. C. A. Weck was the superintendent of the defendant (Pr. Rec. p. 68). There were two mine foremen and two mill foremen under him (Pr. Rec. p. 69). One H. B. Pope was one of the mine foremen. The shaft was being sunk from the 260-foot level in the Seven Hundred Mine and the hoist used in connection with the work of said sinking, was operated by compressed air power, the air being supplied by the compressor at the mill, and carried to the hoist engine by piping. At the time of the accident, three men were at work in the bottom of the shaft, viz: the deceased, Ed Hegman, James Pianfetti, and plaintiff. (Pr. Rec. p. 73). The method of blasting was as follows: After the men in the shaft had drilled and charged the holes, they would signal to the engineer in the 260-foot level that they were ready to blast. He answered the signal by raising the elevator, a few feet and letting it down again. The fuses were then fired and the men entered the elevator, signalled to the engineer to hoist and were taken to the upper level out of the way of the blasts. (Pr. Rec. p. 38).

At the time of the accident, ten holes had been

charged. What happened next is told by the plaintiff as follows:

"While we had about two holes to load, I told Ed. I says to him, 'You better go up and tell.'—I went up after the iron and went up to the two sixty level; and I met Pope at the two-sixty level. He came off the skip just as I came on and he asked me, 'Where are you going,' and so I says: 'We are going to blast,' or that is, he asked me if we were going to blast and I said yes. I then took the skip and went to the surface, and I was going to have the five bells, from the bottom of the shaft as soon as I went down with the iron and I was going to have the five bells from the two-sixty level and because the boys did not have the primers in yet I was to wait. That signal of five bells was to indicate that we were ready to blast, and when I was up there in the blacksmith shop, I stood in the blacksmith shop and asked the blacksmith if the iron was ready and he said yes. So I went in to the shaft house to get the five bells and Mr. Pope came up and told me to take the iron down, the boss was waiting for me. I then went to the blacksmith shop, and got the iron and then went to the two-sixty level I then went on the skip, and went on the bucket and asked to be lowered down, and when I came down there, I turned around and rang the five bells to the engineer. I rang the five bells for the signal that we were ready to blast. The engineer

moved the bucket about three or four feet from the bottom of the shaft and dropped it down again and that was his signal that he was there and knew what he was doing. Well, Ed. cut the fuses and I lighted them with the iron, and threw the iron again to one side, and we jumped on the bucket, and rung one bell to the top; and that was for to hoist up; and he raised us a little, and we came back again, and he hollered down that he didn't have a pound of air, and to save ourselves. Jim was standing on the bucket all the time while we was lighting the fuses, and he had the candle, and so when he was told that he didn't have any air, we jumped off the bucket again. Well, Jim dropped the candle sticks, and then we were in the dark, and the only way we had to get out was to get up that cable —its a quarter inch cable, steel cable; and I felt around, and of course I could not tell whether Ed. was before me or after me, I didn't have any idea, because we was in the dark; anyway I got hold of the rope, and began to climb the pole. I climbed to the skip chute, and swung myself in the timbers, and then Jim began to holler to me and call for help, and I put my hand out and helped him off the timber, and I asked for Ed. and Ed. began to holler and tell me to help him. I couldn't do anything. I couldn't go down the rope, and pack a man up heavier than me. Well, we stayed till the blast went off, and finally the skip came down and went from that level to the surface to see what was the matter." (Pr. Rec. pp. 37-39). These facts are also

testified to by the engineer in charge of the hoist. (See Pr. Rec. p. 42), and undoubtedly correctly give the details of the accident.

Plaintiff's witness, Guy Falconer, testified as to the cause of the failure of the air. His testimony on this point is as follows, and is nowhere contradicted or questioned:

"On the 9th day of last October, I was employed in the Seven Hundred Mine, and was so employed at the time the explosion that resulted in this case, took place. I was helping Mr. Pope part of the day. He was foreman of the Seven Hundred Mine. As such foreman, his duties were to advise the men, show what they were to do and tell them where to work. The Seven Hundred Mine is a part of the Treadwell department from the Treadwell. It furnishes all the ore for the Hundred Stamp Mill. That mine was under Mr. Pope's supervision at that time. I saw him that day. The explosion took place about eleven o'clock in the morning. The air at the Seven Hundred Foot Mine was disconnected about that time. About a quarter of eleven, Mr. Pope came to me, and told me to get the ladder and I went and got the ladder and he put it against the pipe, and he climbed up and shut the air off. I was standing below holding the ladder for him. He told met to get the wrench so he could uncouple the pipe and I got the wrench, and he and Hoyt unscrewed

the pipe, and he went out That was a few minutes before the explosion. I seen Henry Muset just a few minutes before that. He came up for the iron, and I seen him go down with it. The pipe I speak of seeing them disconnect or unscrew was the pipe that furnished air and power for the shaft in which Henry Muset and Ed. Hegman were working." (Pr. Rec. pp. 43-44). He is also corroborated by Thos. Tatum. (Pr. Rec. p 48).

There was no testimony tending to show, that any of the machinery or appliances were out of repair, or unsafe. No such claim was made. The plaintiff's whole case was based upon the proposition that the defendant Company was liable for the neglience of H. B. Pope in shutting off the air in the manner described. Pope's position and duties are described by plaintiff's witnesses as follows:

"Mr. Pope was foreman in the mine under Mr. Weck—That's the way I understood it, yes sir. I know that Mr. Weck was superintendent of the mine and had entire charge and control of it. Mr. Pope was simply a foreman in this particular mine. The Alaska United Company, is also operating the Ready Bullion as I understand it. Mr. Pope was not foreman at that mine. He wasn't foreman of the general business of the Alaska United Company either. He wasn't foreman of the mill. There was another foreman in charge

of that the same as Mr. Pope was in charge of this particular mine. The Master Mechanic had charge of the mechanical part, of course. (Pr. Rec. p. 49).

C. A. Weck in behalf of the defendant testified among other things, as follows:

"I have been in the mining business about eight years. There was a hoist furnished and a chain ladder furnished the men engaged in sinking this particular kind of a shaft, to get out of the mine after the blasts were fired. In sinking a vertical shaft, it always is the custom to have a chain ladder in the shaft in addition to the other means of escape. These ladders are made of chains and cross bars of iron. They are made of chains for the reason that rock being blasted won't injure them as much as they would wooden ladders. These ladders are supposed to be let down from the lowest set of timbers to the bottom of the shaft, so in case there is any stoppage of the engine in hoisting the men out they would have a chance to climb out by the chain ladder. Wherever we are sinking a vertical shaft, we have a chain ladder. It is furnished to the men who are doing the work for the men to use themselves like any other tools." (Pr. Rec. pp. 70–71).

James Pianfetti testified: "I reside now on Douglland Island, and resided there last October, and was then working for the Alaska United Company, of

which Mr. Weck was superintendent. Had been at work there then close to three years. I knew Mr. Muset. I was working with Muset, and Hegman, and Stephens on that date, sinking a shaft. I don't know the first names. Had been at work in the shaft about three weeks—that is, at the time of the accident, we had been at work about three weeks. Hegman and Muset had been at work with me the whole of this time. On the 9th of October, we had got the shaft sunk about 25 feet below the skip chute. There had been a chain ladder provided for that shaft. It was at that time in the blacksmith shop. We three men had received instructions as to the chain ladder from Mr. Pope. He told me to put it down the shaft. I had a conversation with Hegman and Muset about those instructions; we was talking about it so could blast; we had to put timbers in and then chain 'adder. We concluded to put in the timbers and ladder after the blast went off. It was the duty of all us working there to put down the chain ladder. At the time of the accident the chain ladder was in the blacksmith shop. It had not been removed from there. If that ladder had been in shaft, Hegman could have got out." (Pr. Rec. pp. 72-73). This testimony was nowhere contradicted or questioned.

This brings us to a consideration of the Fourth, Sixth, and Seventh Assignments of Error, which re-

late to the same question and will therefore be presented together.

Fourth Assignment of Error.

The Court erred in refusing the motion of the defendant, made at the conclusion of the whole testimony, to instruct the jury to return a verdict for the defendant. (Pr. Rec. p. 112).

Sixth Assingment of Error.

The Court erred in instructing the jury as follows:

"If he (meaning Pope) had absolute charge of that particular department, and exercised the powers and duties of the master toward the employes working under him, he was a vice-principal."

"If you find from the weight of the evidence in this case, that Pope, the foreman, was the vice-princi pal of the Company or corporation defendant, and that said Hegman lost his life through the careless and negligent act of said Pope, without any negligence on the part of Hegman himself, then you should find for the plaintiff."

Seventh Assignment of Error.

The Court erred in instructing the jury as follows:

"There is some evidence before you in reference to a chain ladder ordered to be furnished to the men in sinking the shaft, and that said ladder was a reasonable and proper means used, or to be used, by the men sinking the shaft, whereby they might escape from danger in case of accident to the other machinery and appliances used in hoisting the men from the shaft at such times as blasts were exploded. If you find from the weight of evidence in this case that a ladder was furnished to the men for their use in this behalf, and through the carelessness and negligence of the men engaged in the work of blasting in the shaft, and that the deceased Hegman was one of these, and that the men could have escaped from impending danger had the ladder been put in place, and they negligently and carelessly failed to put it in place, this was contributory negligence upon the part of the deceased and the other men working with him such as relieved the defendant from all liability for his death. If, on the other hand that such ladder was not furnished to the employees, and was not put in place because of the orders of the said Pope, if you find Pope to have been a vice-principal, and that the death of Hegman resulted from the failure to put in said ladder and by the shutting off of the air by Pope, or under his orders and

directions so that the other machinery and appliances for hoisting the men could not be operated; and you further find that Pope was so acting, in shutting off the air, was exercising duties entrusted to him as a vice-principal of the master, then the defendant is liable for the death of the said Hegman. (Pr. Rec. pp. 114-115).

The Bill of Exceptions shows (Pr. Rec. pp. 87-88) that at the conclusion of the whole testimony, defen dant moved the Court to instruct the jury to return a verdict for the defendant; first, because the evidence conclusively showed that H. B. Pope, whose negligence in cutting off the air is the only negligence plead or attempted to be proven by plaintiff, was a fellow-servant of the deceased Ed. Hegman.

Second, The evidence conclusively showed that the deceased Edward Hegman and the plaintiff, Henry Muset, were guilty of contributory negligence in not putting the chain ladder in the pit, and that but for such contributory negligence the accident resulting in the death of Ed. Hegman would not have occurred. But the Court overruled this motion, and the defendant excepted.

The Bill of Exceptions further shows (Pr. Rec. pp. 90 91) that the Court thereupon gave its instructions to the jury on the subject of the defendant's lia-

bility for the acts of Pope, quoted in the Sixth Assignment, and the defendant excepted. And on the question of contributory negligence the Court gave the instruction quoted in the Seventh Assignment, and the defendant excepted.

There are two legal propositions involved in the ruling complained of. First, Was there anything in the evidence, tending to show that Pope was a vice-principal of the defendant, and not a fellow servant of the deceased? And, second, Was there anything in the evidence from which it could be reasonably inferred that the deceased was not guilty of contributory negligence?

If either of the propositions must be answered in the negative, then the defendant was entitled to the peremptory instruction prayed for. Unless they can both be answered in the affirmative, the judgment must be reversed.

The first proposition has been authoritatively settled, by the Supreme Court of the United States in the case of Alaska Treadwell Gold Mining Co. vs. Whelan, 168 U. S. 86. In that case one Finley, the foreman or boss in charge of the mine ordered the plaintiff to break rock over a chute While performing that work, Finley negligently failed to give notice that the ore was going to be drawn through the chute, and

the plaintiff was injured by such negligence. There was testimony tending to show that Finley had authority to hire and discharge employees under him. Finley employed the plaintiff, and his duties were to "see that the men did their work, to direct them where to work and to notify them when the rock was to be drawn from the chutes. It was the duty of plaintiff to obey Finley's orders. Finley was his boss, (See C. C. A. Rep. 12 p. 227). The whole mine was under a general manager. These facts were undisputed. In the case at bar, the whole mine was under one C. A. Weck. Under him were two mine foremen. Pope was one of the mine foremen. The duties of the mine foremen were to carry out the orders of the superintendent, Mr. Weck, who was the head of the business in Alaska. They were employed by the Superintendent and were subject to be discharged by him. The foremen had no authority to hire and discharge men; their only authority in that respect was to recommend. (See Pr. Rec. pp. 68-69). These facts were undisputed, and under the law it made him a fellow-servant of a higher rank than the plaintiff's intestate, it is true, but none the less a fellow-servant, "employed in the same department of business and under a common head."

Again in Keegan vs. Ry. Co. 160 U. S. 259, the facts were that "the direction of all these operations (by which plaintiff was injured) was with O'Brien, who is called in the evidence sometimes 'Foreman driller,'

sometimes, 'conductor of the drill crew.' The general management of the operation was with him, and he had control over the persons employed therein." But the general instructions came from the yardmaster and O'Brien, as well as the plaintiff, were under him. Keegan was injured by the negligence of O'Brien in ordering him to couple cars, which he had just ordered to be uncoupled from a backwardly moving train to stationary cars beyond without himself being on the moving cars, or seeing that another was on them to exercise control over their movements. It was held by the Supreme Court that O'Brien was a fellow-servant of Keegan, and he could not recover. In the course of the opinion, the following language of the Supreme Court, of New Jersey, is quoted with approval:

"Whether the master retain the superintendence and management of his business, or withdraws himself from it and devolve it on a vice-principal or representative, it is quite apparent that although the master or his representative may devise the plans, engage the workmen, provide the machinery and tools, and direct the performance of the work, neither can, as a general rule, be continually present at the execution of all such work. It is the necessary consequence that the mere execution of the planned work must be intrusted to workmen, and, where necessary, to groups or gangs of workmen, and in such case that one should be selected

as the leader. boss, or foremen, to see to the execution of such work. This sort of superiority of service is so essential and so universal that every workman, in entering upon a contract of service, must contemplate its being made use of in a proper case. He therefore makes his contract of service in contemplation of the risk of injury from the negligence of a boss or foreman, as well as from the negligence of another fellow-workman. The foreman, or superior servant stands to him, in that respect, in the precise position of his other fellow-servants."

This decision and the language qucted is peculiarly applicable to the case at bar. Here the defendant had devolved the management of its business upon a vice-principal, C. A. Weck; Weck employs foremen to carry out his orders in different parts of the work under him; one of these foremen negligently injures a laborer under him; the negligence consists, not in the giving or failing to give any instructions as foreman, but in doing at an inopportune moment a piece of work with his own hands that which might have been done by any other laborer. The negligence in short, was not even the negligence of the foreman, Pope acting as foreman, but it was the negligence of Pope working at the time as an ordinary laborer. Under the undisputed facts, and the authorities cited, we think it clear that Pope was a fellow servant, and that the prayer

for a peremptory instruction for the defendant should have been granted on that ground. (Stevens vs. Chamberlain, 100 Fed. 379. See also the very late case of McDonald vs. Buckley, 109 Fed. 290).

We will now also briefly present our views on the other branch of the question. Was the plaintiff's intestate guilty of contributory negligence? Again the facts are undisputed. Pianfetti testified that the defendant company furnished a chain ladder, to be put in the shaft whereby the men could get out, in the event of the hoist failing for any reason to work. (Pr. Rec. p. 73). Weck testified to the same thing. (Pr. Rec. pp. 70-71). Pianfetti further testifies that he was told to put this ladder in the shaft by Pope; that it was the duty of the men at work in the shaft, the plaintiff, the plaintiff's intestate, and Pianfetti to put the ladder in the shaft. He talked the matter over with Hegman and Muset, and they concluded that it was not necessary to put the ladder down until after the blast was fired. That blast was the one that killed Hegman. Under these facts, the defendant was not liable for the death of Hegman. Having provided an appliance to secure the safety of the employee, the employee must use that appliance to secure his own safety. If he neglect to do so, and he is injured, where he would not have had been had the appliance been in use, he cannot recover. (Hunt vs. Kile, 98 Fed. 49). In that case,

the plaintiff's intestate was killed by the breaking of an anchor rope, whereby a pile was dropped upon him. It was held that the failure of the employer to furnish clocks to the employee as a preventive of such an accident, if negligence; was a risk assumed by the employee, since he had full knowledge of such matters. In the case at bar, the chain ladder as a preventative of the fatal accident was furnished by the employer, but the employee and his fellows negligently postponed its use. Certainly then as a matter of law, the plaintiff's intestate assumed the risk, and the jury should have been peremptorily instructed to find for the defendant on this ground also. Instead, the Court, gave the instruction quoted in the VII Assignment, to which the defendant excepted because the evidence conclusively showed that the chain ladder was furnished, and the Court erred in submitted that question to the jury.

Fifth Assignment of Error.

"The Court erred in instructing the jury as follows:

"In defining the duties of the master toward the servants, I cannot do better than to use the language of the Supreme Court of the United States: 'A master employing a servant impliedly engages with him that the place in which he is to work, and the tools or

machinery with which he is to work, or by which he is to be surrounded, be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter his service he impliedly says to him that there is no other danger in the place, the tools, the machinery, than such as is obvious and necessary. Of course, some places of work, and some kinds of machinery are more dangerous than others; but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits, the master who provides the place, the tools, and the machinery owes a positive duty to his employee in respect thereto. That positive duty does not go to the extent of a guaranty of safety, but it does require that reasonable precaution shall be taken to secure safety; and it matters not to the employee by whom that safety is secured or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty; and if the master, instead of discharging it himself, see fit to have it attended to by others, that does not change the measure or obligation to the employee, or the latter's right to insist that reasonable precautions shall be taken to secure safety in these respects. Therefore, it will be seen that the question turns rather on the character of the act than on the relation of the employees to each other. If the act is one done in the discharge of some positive duty, then

there should be some personal wrong on the part of the employee before he is held liable therefor. But it may be asked: Is not the duty of seeing that competent and fit persons are in charge of any particular work as positive as that of providing safe places and machinery? Undoubtedly it is, and requires the same vigilance in its discharge, but the latter duty is discharged when reasonable care has been taken in providing safe place and machinery, and so the former is as fully discharged when reasonable precautions have been taken to place fit and competent persons in charge. Neither duty carries with it an absolute guaranty. Each is satisfied with reasonable effort and precaution." (Pr. Rec. pp. 112-114).

The Bill of Exceptions shows (Pr. Rec. pp. 88-90) that the Court gave the instruction quoted in the above Assignment, and that the defendant excepted thereto, because not applicable to the issues made by the pleadings, and the evidence, in that the question of the failure of the master to provide a safe place to work, nor the question of the negligence of the master in selecting competent and fit persons to have charge of any particular work, were not raised either by the pleadings or the evidence.

The only allegations of negligence found in the Complaint are contained in the V paragraph (Pr. Rec.

p 9) and this negligence is charged to be the "negligence and carelessness of the officers, foreman, and vice-principal of said defendant corporation in causing said air and power to be cut off, etc." There is not a word about a failure of the defendant to furnish a safe place to work, or the failure of the defendant to employ fit and competent persons to have charge of the work. The evidence is all in the record and there is nowhere any evidence tending to show that the place where plaintiff was employed was unsafe, or that any employer of the defendant was incompetent, or unfit.

Under these circumstances, it was error to give the charge quoted and thereby leave it to the jury to find for the plaintiff if they saw fit, upon the ground that the place in which he was put to work was unsafe, or upon the ground that the machinery or appliances are unsafe, or upon the ground that the master had failed in his duty of employing competent and fit persons to have charge of the work. Yet all these questions are submitted to the jury. The jury might well infer from the charge complained of, that they were authorized by the Court to pass upon and determine whether or not Pope was a competent and fit person, and if they believed he was not, to find for the plaintiff. The attention of the jury should have been confined simply to the issues made by the pleadings and the evidence,

and not to do so was error. (Hunt vs. Kile, 98 Fed p. 53).

In conclusion, we respectfully submit that the judgment of the United States District Court for Alaska should be reversed, and a new trial granted.

J. F. MALONEY.
MALONEY & COBB,
Attorneys for Plaintiff in Error.

No. 710

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE ALASKA UNITED GOLD MINING COMPANY,
Plaintiff in Error,

vs.

HENRY MUSSET, AS ADMINISTRATOR OF THE ESTATE OF EDWARD HEGMAN, DECEASED,
Defendant in Error.

Motions to Dismiss and Affirm and to Vacate Supersedeas and Brief Thereon.
and
Brief for Defendant in Error on the Merits.

LORENZO S. B. SAWYER,
Counsel for Defendant in Error.

THE FILMER BROTHERS CO. PRINT, 424 SANSOME STREET, S. F.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE ALASKA UNITED GOLD MINING COMPANY,
Plaintiff in Error,
vs.
HENRY MUSSET, as Administrator of the Estate of Edward Hegman, Deceased,
Defendant in Error.
No. 710.

On Error to the United States District Court for Alaska, Division No. 1.

Motions to Dismiss and Affirm, and Motion to Vacate Supersedeas.

Comes now the defendant in error, by his counsel, and moves the Court to dismiss the writ of error herein upon the following grounds:

1. The bill of exceptions herein was not settled, approved, signed, or filed in time.

2. The Court below had no jurisdiction to order the bill of exceptions herein filed *nunc pro tunc* as of a previous day and term, or to order it made a part of the record in the case.

3. The writ of error and the citation in this case were made returnable more than thirty days from the day of signing the citation and at different days, and neither the writ nor the citation were annexed to and returned with the record.

4. No assignment of errors was filed with the clerk of the court below with the petition for the writ of error.

And said defendant in error, by his counsel, also moves the Court to affirm the judgment of the Court below with damages at a rate not exceeding ten per cent, in addition to interest upon the amount of the judgment, on the ground that although the record may show that this Court has jurisdiction, it is manifest the writ was taken for delay only, and that the grounds thereof are frivolous.

And said defendant in error, by his counsel, also moves the Court to vacate the order of the Judge of the lower court staying execution of the judgment herein and the so-called supersedeas bond herein, upon the following grounds:

1. The said order was conditioned upon the giving of a bond which was not *thereafter* given. (Record, 25.)

2. The only bond given is void and of no effect because *given* before the allowance, issue, or filing of the writ of error, or the signing of a citation on said writ. (Record, 30, 25, 2, 3, 4.)

These motions to dismiss and affirm and to vacate supersedeas are preliminary motions which the Court may see fit to decide before it takes up the cause upon its merits. Their object is, if possible, to expedite and speed the cause. The Court may not find it necessary to go into the merits of the case. These motions are made upon the record on file herein, and plaintiff in error and his counsel are hereby notified that these motions will be argued and submitted when the case comes on for hearing before this Court.

L. S. B. SAWYER,
Counsel for Defendant in Error.

To Plaintiff in Error and MALONY & COBB, and JOHN FLOURNOY, Esqs., His Counsel.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE ALASKA UNITED GOLD MINING COMPANY,
Plaintiff in Error,
vs.
HENRY MUSSET, as Administrator of the Estate of Edward Hegman, Deceased,
Defendant in Error.
No. 710.

On Error to the United States District Court for Alaska, Division No. 1.

Brief on Motions.

MOTION TO DISMISS WRIT OF ERROR.

We will take up these several motions and go over their respective grounds seriatim briefly.

1. Because the bill of exceptions was not settled, approved, signed, or filed in time.

The judgment herein was rendered and entered on March 16, 1901, in the December, 1900, term of the Court. (Record, 22; rule 3, par. 2, of said Court.) On the same day a motion for a new trial was denied, and the defendant was allowed forty days in which to reduce his exceptions to writing and present the same for allowance and settlement by the Court. (Record, 107, 108.) But said bill of exceptions was not approved or signed until

May 7, 1901, or filed until May 8, 1901 (Record, 110), after the term in which judgment was entered had expired (the December, 1900, term of the Court expired on the 30th day of March, 1901, Rule 3, par. 2), and twelve and thirteen days, respectively, after the time granted had expired and no further extension of time to file said bill was ever applied for or granted.

"When a bill of exceptions is presented to and signed by the Judge after the close of the term, and the record fails to disclose any order extending the time for its presentation, or any consent of parties thereto or any standing rule of Court authorizing such approval, the Supreme Court will affirm the judgment."

Syll. U. S. v. Jones, 149 U. S. 262.

The concluding sentences of the decision are:

"The bill of exceptions was therefore improvidently allowed. (Muller v. Ehlers, 91 U. S. 249; Jones v. Sewing Machine Co., 131 U. S. Append. c. 1; Bank v. Eldred, 143 U. S. 293.) As the errors assigned arise upon the bill of exceptions, we are compelled to affirm the judgment; and it is so ordered."

In Muller v. Ehlers, supra, says the Court: "But it does not appear that the bill of exceptions was filed, signed, tendered for signature, or even prepared before the adjournment of the court for the term at which the judgment was rendered. No notice was given to the plaintiff of any intention on the part of the defendants to ask for the allowance of a bill of exceptions either during the term or after. No application was made to the Court for

an extension of time for that purpose. No such extension of time was granted and no consent given. Upon the adjournment for the term the parties were *out of court*, and the litigation there was at an end. The plaintiff was discharged from further attendance; and all proceedings thereafter, in his absence and without his consent, were *coram non judice*. The order of the Court, therefore, made at the next term, directing that the bill of exceptions be filed in the cause as of the date of the trial, was a *nullity*. For this reason, upon the case as it is presented to us, the bill of exceptions, though returned here, cannot be considered as part of the record." The Court then distinguishes the case of U. S. v. Breitling, 20 How. 253, and says: "That case went to the extreme verge of the law upon this question of practice, and we are not inclined to extend its operation. It was said by this Court in Generes v. Bonnemer, 7 Wall. 565, that 'to permit the Judge to make a statement of the facts on which the case shall be heard here, after the case is removed to this court by the service of the writ of error, or *even after it is issued*, would place the rights of parties who have judgments of record entirely in the power of the Judge, without hearing and without remedy.' This language is substantially adopted in Flanders v. Tweed, 9 Wall. 425, where it was said: 'The statement of facts by the Judge is filed upon the 29th May, 1868, nearly three months after the rendition of the judgment. This is an irregularity, for which this Court is bound to disregard it, and to treat it as *no part of the record.*' As early as Walton v. U. S., 9 Wheat. 651, the power to reduce exceptions taken at the trial to form and to have them signed and filed, was, under ordi-

nary circumstances, confined to a time not later than the *term at which the judgment was rendered.* This, we think, is the *true rule,* and one to which there should be no exceptions without an express order of the Court, during the term or consent of the parties, save under very extraordinary circumstances. Here we find no order of the Court, no consent of the parties, and no such circumstances as will justify a departure from the rule. A judge cannot act judicially upon the rights of parties after the parties in due course of proceeding have both in law and in fact been dismissed from the court."

In Bank v. Eldred, supra, says the Court:

"By the uniform course of decision no exceptions to rulings at a trial can be considered by this Court unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the Judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of Court, or by consent of parties; and save under *very extraordinary circumstances, they must be allowed by the Judge and filed with the clerk during the same term.* After the term has expired, without the Court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, all authority of the Court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed is at an end," citing cases.

See, also, Miller v. Morgan, 14 C. C. A. 312, and the case of Minor v. Tillotson, 2 How. 392, which holds that the Supreme Court will not revise on writ of error,

where there is no bill of exceptions, though the whole of the evidence appears in the record.

What's the difference between a bill of exceptions *improvidently filed* that *cannot be considered,* and no bill of exceptions? The decision in Minor v. Tillotson, supra, concludes: "A judgment of affirmance is therefore entered at the costs of the plaintiff in error."

Cases in the United States Circuit Courts of Appeals to the same tenor and effect are too numerous to cite. Here follow a few of them: R. Co. v. Hyde, 5 C. C. A. 461; U. S. v. Carr, 10 C. C. A. 80. The Court has no power to enlarge the time fixed by the order of the Court entered during the term. A bill of exceptions so allowed is no part of the record and cannot be considered on writ of error. (Ry. Co. v. Russell, 9 C. C. A. 108, citing other cases.) No bill of exceptions was * * * signed by trial Judge during the term at which trial was had and judgment rendered, nor within any extension for that purpose, either by order or by consent of counsel, etc. The certificate of the Judge is unavailing. (R. & D. R. Co. v. McGee, 2 C. C. A. 81.) Now, therefore, unless the mere presentation of a proposed bill of exceptions is more important than the settlement, approval, signing, or filing thereof, or unless the circumstances of this case were *so extraordinary* as to justify such a departure from proper practice, this bill of exceptions was filed too late to be considered, and, in the language of one of the Supreme Court cases cited, "as the errors assigned arise upon the bill of exceptions," this Court will be "compelled to affirm the judgment."

The next ground of dismissal of the writ of error herein—

2. The Court below had no jurisdiction to order the bill of exceptions herein filed *nunc pro tunc* as of a previous day and term, or to order it made a part of the record in the case—is abundantly supported by the authority of the case, Muller v. Ehlers, already cited. The bill of exceptions was not settled, approved, signed, or filed, either during the term at which the judgment was entered, or during the time thereafter granted, and no further extension of time to file said bill was ever granted or applied for. The case had been removed to this court by not only the issue, but by the filing and service of a writ of error. "The order of the Court, therefore, made at the *next* term, directing that the bill of exceptions be filed in the cause as of the date of the trial" (as of a previous day and term), "*was a nullity.* For this reason upon the case as it is presented to us, the bill of exceptions, though returned here, cannot be considered as part of the record."

That—

3. The writ of error and the citation in this case were made returnable more than thirty days from the day of signing the citation, and at different days and neither the writ nor the citation were annexed to and returned with the record (Record, 3, 5)—we do not care to discuss, because we suppose that the Court would, under R. S., sec. 954, permit such defects to be amended.

We come now to the gravest error made in trying to get up here, alone an abundant ground of dismissal of the writ and affirmance of the judgment herein.

4. No assignment of errors was filed with the clerk of

the Court below with the petition for the writ of error. (Record, 26, 116.)

Rule 11 of this court provides:

"Rule 11. Assignment of Errors.—The plaintiff in error or appellant *shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors* which shall set out separately and particularly each error asserted and intended to be urged. *No writ of error* or appeal *shall be allowed* until such assignment of errors *shall have been filed.* * * *"

The petition for writ of error was filed April 17, 1901 (Record, 26), while the so-called assignment of errors was not filed until May 7, 1901 (Record, 116), twenty days after the filing of the petition.

Counsel for plaintiff in error seems to have been aware that this writ of error was issued contrary to law, and was consequently void, and that their bill of exceptions, assignment of errors, and bond were not filed at the proper time. (Record, 31.)

What says a late decision of the Circuit Court of Appeals of the Eighth Circuit, April 13, 1901?

"Assignment of Errors—Filing Before Issue of Writ Indispensable.—The filing of an assignment of errors before the issue of a writ of error is indispensable under the eleventh rule of the Circuit Courts of Appeals [our rule already cited], and the writ will be dismissed if the assignment is not filed before it issues [Syllabus by the Court].

* * * * * * * * *

"A motion has been made to dismiss the writ of error in this case because the assignment of errors was not filed until after the writ was issued. Section 997 of the Revised Statutes makes an assignment of errors, a prayer for reversal, and a citation to the adverse party essential parts of the record upon which a review of the rulings of a trial court may be invoked in the appellate courts of the United States. Rule 11 of this Court provides that 'the plaintiff in error or appellant shall file with the clerk of the court below, *with* his petition for the writ of error or appeal, *an assignment of errors* which shall set out separately and particularly each error asserted and intended to be urged. *No writ of error or appeal shall be allowed* until such assignment of errors shall have been filed.' [Word for word our C. C. A. rule.]

"This is a just and reasonable rule. It makes the filing of the assignment of errors before the writ is allowed indispensable to its issue, to the end that the Judge to whom application is made for its allowance may be informed what the alleged errors are upon which the petitioner relies, and may thus intelligently decide whether or not the prayer of his petition should be granted, and also to the end that the opposing counsel and the appellate court may be informed what questions of law are raised for consideration. In the early history of this court attention was sharply called to this rule, and the announcement was clearly made that it would be enforced, although in the early cases in which its enforcement was invoked we carefully examined the errors assigned in order that no injustice might result from the application of the rule.

U. S. v. Goodrich, 4 C. C. A. 160, 54 Fed. 21, 22.
Union Pacific R. Co. v. Col. Eastern R. Co., 4 C. C. A. 161, 54 Fed. 22.
City of Lincoln v. Sun Vapor St. Light Co., 8 C. C. A. 253, 59 Fed. 756, 759.

"The writ of error in this case was filed on August 18, 1900, and no assignment of errors was presented with the petition, and none was filed until August 20, 1900, *two days* after the issue of the writ. An affidavit has been presented in explanation of the failure to present the assignment of errors before the writ was issued, but it presents no sufficient excuse for a failure to comply with the rule. The motion to dismiss the writ is granted.

Flahrity v. R. R. Co., 6 C. C. A. 167, 56 Fed. 908.
Crabtree v. McCurtain, 10 C. C. A. 86, 61 Fed. 808.
Lloyd v. Chapman, 35 C. C. A. 474, 93 Fed. 599, 601.
Ins. Co. v. Conoley, 11 C. C. A. 116, 63 Fed. 180.
Great Creek Coal Co. v. F. L. & T. Co., 63 Fed. 891.
Van Gunden v. Iron Co., 3 C. C. A. 294, 52 Fed. 838.
Ry. Co. v. Reeder, 22 C. C. A. 314, 76 Fed. 550."
Frame v. Portland Gold Mining Co. (C. C. A.), 108 Fed. 750.

In Ins. Co. v. Conoley, supra, additional time within which to file assignment of errors had been granted, which makes it all the stronger in our favor. This Court has dismissed a case for want of an assignment of errors.

Parker v. Dunning, opin. May 23, 1898, No. 528.

What's the difference between an assignment of errors that cannot be considered and no assignment? We could

cite other cases to same effect; but what is the use? Haven't we proved our point, and must not this writ be dismissed and the judgment of the Court below herein affirmed?

Our next motion, to affirm with damages, is in accordance with the rule and practice of the Supreme Court (Rule 6, par. 5) adopted by rule 8 of this Court, uniting with a motion to dismiss a writ of error or an appeal a motion to affirm. In one case there was no proper bill of exceptions. The Supreme Court affirmed the judgment with damages at the rate of ten per cent.

Sire v. Air-Brake Co., 137 U. S. 579.

"We have jurisdiction of this case. The motion to dismiss is therefore denied, but * * * the motion to affirm is granted."

Swope v. Leffingwell, 105 U. S. 3.

"Our jurisdiction of this case is clear. The motion to dismiss is therefore denied, but we think the motion to affirm should be granted."

Hinckley v. Morton, 103 U. S. 764.

"There is sufficient color on the motion to dismiss to warrant us in entertaining the motion to affirm. Judgment affirmed."

The Alaska, 103 U. S. 201.
Evans v. Brown, 109 U. S. 180.
The Tryon Case, 105 U. S. 267.
Micas v. Williams, 104 U. S. 556.
Chanute City v. Trader, 132 U. S. 210.
Sugg v. Thornton, 132 U. S. 524.

The grounds of our next motion, to vacate the order of the Judge of the lower court staying execution of the judgment herein and the so-called supersedeas bond herein have been already stated.

The so-called supersedeas bond was given on the 12th day of April, 1901, and filed April 17, 1901. (Record, 30.) The petition for the writ of error and the order allowing the writ and staying execution were dated April 13, 1901, and filed April 17, 1901. (Record, 25, 26.) The writ of error was dated April 15, 1901, and filed in the court below April 17, 1901. (Record, 2, 3.) The citation on writ of error was dated May 13, 1901, and filed in the lower court May 20, 1901. (Record, 4, 5.)

So, then, this bond *on writ of error* was given three days before the writ was issued and five days before it was filed, and a month before the citation was signed. The statute requires the Justice or Judge signing the citation on any writ of error to take the bond at the same time. (R. S., sec. 1000.) How can this bond then operate as a supersedeas, and if the bond falls, does not the order conditioned upon it fall also?

"A supersedeas is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with," citing cases.

Sage v. R. R. Co., 93 U. S. 412.

What says another section of the law?

"But if he [defendant] desires to stay process on the judgment, he may, *having served his writ of error,* as aforesaid, give the security required by law, etc."

R. S., sec. 1007.

The writ of error was not served (by filing) in this case until April 17, 1901 (Record, 3), although the bond was given April 12, 1901. (Record, 29, 30.)

"If a supersedeas is asked for when the writ is obtained, the writ must be sued out and served * * * *and the required bond executed when the citation is signed.* * * *"*

Kitchen v. Randolph, 93 U. S. 86.

"Its [the writ's] issuance must, *of course,* precede the execution of the bond. * * * "

Telegraph Co. v. Eyser, 19 Wall. 419.

A justice of the Supreme Court allowed a supersedeas, "evidently supposing that a writ of error had actually been issued." It was afterwards made to appear to the Supreme Court that no writ of error had issued. The Supreme Court thereupon denied a motion to vacate the so-called supersedeas, as follows:

"As no writ of error has ever been issued, that [supersedeas] order has no legal effect. A supersedeas cannot be allowed except as an *incident* to an appeal actually taken, or a *writ of error actually sued out.* We, however, are as much without jurisdiction to vacate the order of the justice as he was without jurisdiction to grant it. Consequently, the motion to vacate must be denied, although *the order, as it stands, is of no validity.*"

Ex parte Ralston et al., 119 U. S. 613.

In another case the Supreme Court denied a motion to vacate a supersedeas as "*unnecessary*" where the writ of error was not sued out or served within the time required

by the statute in order that the bond operate as a supersedeas.

Western Air-Line Const. Co. v. McGillis, 127 U. S. 776.

As no writ had been issued when the so-called supersedeas bond herein was given, the said bond was a nullity, and the writ of error afterwards sued out did not operate to stay execution upon the judgment herein. Although, perhaps, *unnecessary,* we hope this Court will declare that the said bond does not and cannot operate to stay execution of our judgment herein.

If we are entitled to an execution of our judgment *forthwith,* let us have it. There is nothing mean in a suitor's asking for all that he is entitled to.

ON THE MERITS.

The first twelve pages of the brief of plaintiff in error are devoted entirely to what they claim to be a statement of the case taken from the pleadings and evidence, but as they have simply taken excerpts from the complaint and evidence which are most favorable to their contention, we deem it wise to here state some of the facts proven and allegations relied upon by defendants in error. It will be seen from the brief of plaintiff in error that the only errors relied upon or presented are those contained in their fifth, sixth and seventh assignments:

1st. Was H. B. Pope vice-principal or a fellow-servant?

2d. Was the deceased guilty of contributory negligence?

3d. Were these propositions fairly submitted to the jury under the instructions of the Court?

For it is conceded that if from the facts proven H. B. Pope was not in law a fellow-servant, or deceased was not as a matter of law guilty of legal neglect, then the judgment should be affirmed.

Now let us see if Pope was not a vice-principal, bearing in mind that the Seven Hundred Mine, where deceased lost his life, is a separate and distinct department of the company's working. The mine furnished all of the ore for the Seven Hundred Mill, which is situate on the beach a long distance from the mine, to which the ore is conducted by means of a tramway. Now the mine where deceased lost his life consists of tunnels, shafts, "Glory Hole," stopes, hoists, elevators, machine shops, blacksmith shop, power plant, air pipes, and etc.

Now we contend, and it is conceded, that this entire branch or department in all its details was under the complete, exclusive, and entire control and immediate supervision and management of Pope, under powers delegated to him by the master—and who exercised all of the functions of the master in relation thereto—and this we contend under the law constitutes him a vice-principal and not a fellow-servant.

Now let us examine the evidence on this point.

1st. Take the evidence of defendant in error (Record, at the top of page 37); he says, speaking of the working in the mine:

"Well, they got a man looking after each gang; he is called shop boss or shift boss or pit boss or so. Those working in the shops, or working in the mines are working under bosses. There is a general foreman or supervisor

of all of those forces. His name on that occasion was H. B. Pope. Mr. Pope was the man that directs everybody and told them what to do, and ruled the whole thing, and sent a gang there and another here or so. He both employed and discharged men."

The next witness called was Nels Olin. (See his testimony at the foot of page 41, Record.) He says:

"I am acquainted with H. B. Pope. He was foreman of the mine. No other person, as far as I know, other than H. B. Pope directed the labor or acted as foreman of that department of the company's work." And again at the bottom of page 42 and page 43 he says: "The men employed in the mine were working in different groups. There was a pit and two stopes and then a shaft and blacksmith shop, and hoist and tramway—four gangs. Well, some was working in the stopes drilling, some was blasting and some breaking rock, and they had a shift boss over them to look what they were doing."

"Q. I'll ask you to state to the jury if you know whether or not there was a general foreman or superintendent over them. A. Yes, sir.

Q. Who was that?

A. Mr. Pope was the foreman.

Q. H. B. Pope? A. Yes, sir."

The next witness called was Guy Falkner. (See his evidence, commencing at the foot of page 43, Record.) He says: "I was helping Mr. Pope part of the day. He was foreman of the Seven Hundred Mine. As such foreman his duties were to advise the men, show what they were to do and tell them where to work. It furnishes all the ore for the Seven Hundred Stamp Mill. That

mine was under Mr. Pope's supervision at that time." Also at the bottom of page 44, he says: "I know that Mr. Pope had supervision of that property, because he instructed the men and hired them and discharged them too. I am sure he hired and discharged them."

And again, commencing at the bottom of page 47, Record, he says: "When I said Mr. Pope had charge of the work. right there, I meant the Seven Hundred Mine, and the *entire mine. Mr. Pope did not work generally in any department around the mine.*"

The next witness called was Thomas Tatum. (Page 48, Record.) He says that he was blacksmith at the mine, that Pope was his superior and directed him, and that he (Pope) had general superintendency of the operations of the mine.

And at the top of page 50 he says: "The men employed in the various departments of the Seven Hundred Mine, such as blacksmiths, engineers, miners and drill-men were under Mr. Pope's immediate supervision as I understood it."

The above were all of the witnesses called on behalf of the plaintiff below in the opening of his case. The three witnesses called on behalf of plaintiff in error on the trial all testified that Pope had general supervision of the mine and controlled their entire department. Their first witness, Mr. A. C. Weck, said he was a general superintendent of the company's mines in Alaska, which consisted of the Ready Bullion Mine, Ready Bullion Mill, the Seven Hundred Mine, and the Seven Hundred Mill (at the top of page 69, Record). He testified that he knew Mr. Pope and that he was employed on the Seven Hundred

Mine; at that *time* he was *foreman* of *the mine* at the Seven Hundred foot claim. Then on 72, Record, he says: "The engine, an engineer, the blacksmith shop and blacksmith, and so on. And all of these people are under the immediate supervision of the *foreman* and *that foreman was Mr. Pope.*" Then he says: "I couldn't state where Pope is now. He is not at the mines, nor in Alaska. He left Alaska on the 20th of January [1900], I think, after this suit was brought against the company. The general office of the company is on Douglas Island at the store up by the Treadwell mine. That's where the men report. My office is there. I haven't any particular office at the Ready Bullion or the Seven Hundred. The whole of these mines at Treadwell, the Ready Bullion, the Mexican, the Seven Hundred, the Treadwell, and all the rest of them, *office* from the same general point, the store. And these people when discharged reported there from all these places. The foreman in this mine orders the miners' supplies—the small supplies he needs temporarily. And if there is a temporary break in the machinery, and he has the time and it is not too extensive, it's his duty to repair it, or see that it is repaired. If it's extensive he reports it to me. All small breaks the men look after themselves."

The only other witnesses called for the plaintiff in error on the trial of the case were James Pianfetti and Robert Muster, both of whom testified that Pope as foreman had full charge and control of the Seven Hundred Mine. In fact, it was admitted on the trial that such was his authority.

Now with these facts before us, let us see if under the authorities cited by counsel for plaintiff in error Mr. Pope was not a vice-principal and not a fellow-servant. Take the case upon which they most rely, viz., Alaska Treadwell Gold Mining Co. v. Whelan, 168 U. S. 86.

First, let us examine the history of this case. It will be seen that this case was taken from the Alaska Court to this Court by writ of error and by this Court affirmed in a very able opinion by Judge Hawley. Mr. J. F. Malony, who was then attorney for the respondent, immediately thereafter became attorney for plaintiff in error. After the affirmance by this Court, the records show that the judgment was paid and satisfied in full by the company. Notwithstanding, however, the case was taken from this Court to the Supreme Court of the United States by some means, and there, as we are advised, upon an ex parte hearing this decision was rendered, notwithstanding the Supreme Court was without jurisdiction, for the very apparent reason that the amount involved was but $2,500. Be that as it may, however, we are entirely within the rule laid down in that case. It will be seen that "Finley" referred to in that case was simply a shift boss having charge of a night shift, or boss of one of the various gangs described in the evidence in this case, and did not have supervision of the entire branch or department, as did Pope.

Counsel in his brief says it was Finley's duty to give notice—to notify the men when the rock was to be drawn from the chute, etc. Now it is clear from the evidence in the case at bar that Pope had no such duties to perform. Witnesses say that he did not work generally in

any of the departments of the mine. He had such bosses as Finley was under him who looked after those matters. He (Pope) was the supervisor over all. We say, therefore, that Pope was not a fellow-servant under the authority of the Whelan case.

Counsel next cites the case of Keegan v. Ry. Co., 160 U. S. 259. (This is what we commonly call a railroad case.) As is well known, that branch of the law has become a "rule unto itself" and would hardly be considered authority in cases of this kind, yet an examination of that case shows that we would be entirely within the rule there laid down. It is said in the New Jersey case cited by counsel: "It is the necessary consequence that the mere execution of the planned work must be intrusted to the workmen, and where necessary to groups or gangs of workmen, and in such case that one should be selected as the leader, boss, or foreman."

Now that is exactly what Pope was doing. He was the supervisor. He *planned the work, and* detailed those various groups or gangs of men under foremen or bosses to go and do that work. Pianfetti in charge of the gang of which Hegman, who lost his life, was one, was one of those bosses. So was Finley in the Whelan case, but Pope was there as the *master who planned the entire work of that department,* and had complete supervision over all those gangs, both the day shifts and the night shifts, in this department of the company's works.

Counsel further says, in support of his contention, that Pope was doing a piece of work (when he so negligently shut the air off) which might have been done by any other laborer, and in doing so he was not acting as foreman but

acting as Pope, working at the time as an ordinary laborer. How puerile such argument is! Suppose the master himself had as carelessly cut the air off and killed this man, could it be said that in doing so, for the time being, he was not master, but an ordinary laborer? We think not.

The same may be said of the only other two cases cited by counsel. In fact, we venture to say that there is not a case recorded wherein this man Pope under the evidence would not be held to be a vice-principal. The doctrine of master and servant and that of the duty to the servant by the master has been the subject of much discussion from the time that our American jurisprudence was established on this continent up to the decision of the Ross case by Justice Field of the United States Supreme Court in 1884, at which time the doctrine of master and servant and fellow-servant, and the exemption of the employer from liability by reason of the conduct of those in his employ, both in this country and in England, was a very much mixed and unreconciled question. No two States had agreed upon the rule, and the State and federal courts were at variance as to the true doctrine. But with the promulgation of the rule laid down in the Ross case, the whole country, both here and abroad, has seemed to conform to it, so that now the United States Supreme Court, all the federal courts, and most of the State courts have agreed upon and adhere to that rule, so that it may well be said that all the decisions affecting the rights and duties of employees to their employers and of the employers to their employees, so far as the judicial determination of the question is concerned, flow in the same channel. And the rule is well settled and understood as it is de-

clared in the case of the R. Co. v. Ross, reported in the 112 U. S. 377, 391. The fact is, that a corporation can act only through its superintending officers, and the neglect of those officers with respect to their servants is a neglect of the corporation. This rule is applicable to all employers, but applies with special force to corporations. And as most all business at this time is conducted and operated by corporations, this is undoubtedly the reason which led the learned Judge to remark that: "In the progress of society and the general substitution of the ideal and invisible masters and employers for the actual and visible ones of former times, in the form of corporations engaged in varied, detached, and widespread operations, as in the construction and working of long lines of railroad, as well as in operating mines and other enterprises, it has been seen and felt that the universal application of the rule exempting employers from liability for the carelessness and negligence of their employees who exercise control and supervision over employees of the same class, who are subject to their direction, resulted in hardship and injustice." And so we find the later rule is clear and definite and is followed by subsequent law-writers on the question, as well as by the decisions of the Supreme Court of the United States and the Supreme Courts of the various States of the Union and of the federal courts, which is apparent from an examination of those authorities. In support thereof we would call attention to the eminent and well-recognized authority of

Shearman and Redfield on Negligence,

the latest authority on that subject, whose utterances are

supported by the decisions of the Supreme Court, federal courts and most all of the State courts.

This rule, by reason of its complete adoption in this country, is commonly called the American rule, and is as follows:

"A servant who is intrusted with the management of the master's business or in superintending the operations of that business, and is invested by the master with command and control over other servants of that business or any of its departments, is *not a fellow-servant* with those who are employed under him and subject to his orders, and it makes no difference whether he may be called foreman, overseer, middleman, or boss."

This line of decisions is uniform from the Ross case down to the present time, and Messrs. Shearman and Redfield, in their work on Negligence, say of the rule as follows:

"American Rule—Servant in Common, not Fellow-servant With Others.—Under the rule as declared in Ohio, and since followed by the courts of last resort in Connecticut, West Virginia, Kentucky, Tennessee, Missouri, Illinois, Nebraska, Louisiana, North Carolina, Georgia, Kansas, Texas, Washington, Oregon, Montana, and California, the servant who is intrusted with the general management of the master's business, or with any separate portion of that business, and is vested by the master with command and control over other servants engaged in that business or department, is not a fellow-servant with those who are employed under him and subject to his orders. He acts as the master's substitute, and when the master chooses

to delegate his power of control and management to another person, it is held by those courts that he is liable for the negligence of such representative, while acting as such, to the same extent as if it were his own order, whether the party to whom the power is delegated be designated as foreman, boss, or middleman. This principle has been adopted by the Supreme Court of the United States and we therefore call it the American doctrine. And the liability of the master is not confined strictly to negligence of such a manager in giving orders, but extends also to his negligence in management of any kind."

The master, therefore, under this rule, as sustained and supported by authorities hereafter cited, is not only liable as aforesaid for his foreman or the servants in charge of other employees who are authorized to direct their movements, but is bound, under the law, to furnish his servants with a safe place to work, and with safe and reliable implements to work with, and any direction by the foreman to said servants to work in an unsafe place or with unsafe appliances binds the master in the event of injury occurring to them. There is no way the master can devest himself of this obligation to his employees. He is bound by the conduct of his foreman or boss, he is further bound to furnish them with a safe place to work, safe appliances to work with, and in this regard his foreman or boss stands in his shoes, and the neglect of such person is the neglect of the master.

The master is also bound to employ such men, either as fellow-servants or foreman who possess ordinary skill and exercise careful management, and, if he fails so to

do, an injured employee has a right, under the law, to demand from him just compensation for his injuries.

In support of these conclusions we desire to call the Court's attention to:

Shearman and Redfield on Negligence, secs. 224, 226, 228, and the decision of Justice Field of the Supreme Court of the United States, reported in the 112 U. S. 277.

Bailey on Personal Injuries Relating to Master and Servant, secs. 1833, 1837, 1839, 1841, 1842, 1855, 1857, 1865, 2025, 2033, 2111, 2113, 2114, 2195, 2227, 2360, 2428, 2460.

Thompson on Negligence, vol. 2, pp. 946, 948, 971, and 979.

The Ross case has been somewhat modified by the Baugh case (149 U. S. 368), and later cases, but rather in regard to the *reason* of the rule announced therein, than in regard to the rule itself. Judge Jenkins, only last April, sums up the present state of the law on this subject, thus:

"We have held in Reed v. Stockmeyer, 20 C. C. A. 381, that it is the duty of the master to use ordinary care to furnish appliances reasonably safe for the use of servants —such as, with reasonable care on their part, can be used without danger save such as is incident to the business in which such instrumentalities are employed; that it is also the duty of the master to use like care to provide a safe place in which the laborer may perform his work, and keep it in a suitable condition. These duties may not be foregone, and, when delegated to be performed by another, that other is a vice-principal and quoad hoc rep-

resents the principal, so that his act is the act of the principal. That other may have a dual character—vice-principal with respect to the duty due from the master to the servant and coservant with respect to his acts as a workman. In case of injury, the question of the liability of the master turns rather on the character of the act than on the relations of the servants to each other. If the act is in the discharge of some positive duty owing by the master to the servant, then *negligence therein* is the *negligence of the master;* otherwise there should be personal wrong on the part of the master to render him liable. These principles we understand to be established by the ruling of the ultimate tribunal.

R. R. Co. v. Baugh, 149 U. S. 368.
R. R. Co. v. Keegan, 160 U. S. 259.
R. R. Co. v. Charless, 162 U. S. 359.
R. R. Co. v. Conroy, 175 U. S. 323."
Lafayette Bridge Co. v. Olsen, C. C. A., 7th Cir., April 30, 1901, 108 Fed. 335.

Principals were held liable to workmen for negligence of those put in charge of dangerous materials, structures, and appliances, and no good reason is now made to appear for summarily disturbing the verdict in the following cases:

Beattie v. Edgemoor Bridge Works, 109 Fed. 233.
Mather v. Rillston, 156 U. S. 391.
Railway Co. v. Archibald, 170 U. S. 665.
Hyde Co. v. Kennedy, 40 C. C. A. 69.

Now as to the second proposition. Was Hegman guilty of contributory negligence? That is to say, was he guilty

of such negligence as would authorize the Court to say, as a matter of law, his conduct was such as amounted to legal negligence? There is no rule of law better settled than that contributory negligence as a defense is a question of fact exclusively for the jury, under proper instructions from the Court, and we undertake to say that the instruction complained of in plaintiff in error's seventh assignment of error is not only a proper instruction in this case, but it stretches the law to its very verge in favor of the plaintiff in error. (See 7th assignment, beginning at the bottom of page 97, Record.) After plaintiff below had rested his case, defendant below attempted to show that deceased was negligent by asking two of their witnesses about a certain chain ladder which was about the mine. Mr. Weck simply said that they had chain ladders to be used about the mine in sinking shafts. The only witness whose testimony was in any way material, and upon which the plaintiff in error here relies to show contributory negligence, is that of the gentleman who says he is from Italy and his name is Pianfetti, and whose testimony in relation thereto is in every respect contradicted by the three witnesses called by defendant in error in rebuttal.

Let us see now what Pianfetti says about this ladder. Beginning at the top of page 74, Record, he says: "I was boss over them, for that reason Pope told me to put it down on the morning of the 9th (accident occurred at 11 o'clock A. M. of the 9th).

Q. Didn't Mr. Pope ask you what was the reason the chain ladder wasn't put down before?

A. Before the last blast was going to be, yes, and put the chain ladder down in time. He said, 'Put it down.'

Q. Mr. Pope told you to do it that way, didn't he?

A. Mr. Pope told me to put it down.

Q. Didn't Mr. Pope tell you about eight o'clock that the chain ladder was ready and to put it down at noon?

A. Yes, sir.

Q. Now Mr. Pianfetti—

A. No, sir; he didn't tell me to put it down at noon—

Q. Air was the motive power of that shaft, wasn't it?

A. Yes, sir.

Q. If the bucket was running at all that was a good, safe place to work, wasn't it? A. Yes, sir.

Q. Had you ever had a chain ladder there before that?

A. Not since we were there.

Q. Isn't it a fact that the ladder was broken, and wasn't in a fit condition to be put down at all until that morning?

A. There was a whole one to put down.

Q. Down in the blacksmith shop being fixed, wasn't it?

A. Yes, sir. Pope gave me the instructions to put it down. He had authority to give those instructions. I don't know if Muset and Hegman were in the mine when these instructions were given; they wasn't around there—didn't see them anyway. I can't tell where I first saw them after I had this conversation with Pope. I didn't see them before getting down to the shaft. I think I first saw them when I got down in the shaft. I went down there as soon as Pope told me about it. They were getting ready to blast, shoveling a few buckets of rock, and so.

Q. And then you told them about the ladder business as soon as the blast was over?

A. We had been talking about that over before—

Q. Well, answer my question. You told them as soon as the blast was over you would put up some timbers and then put the ladder down?

A. We noticed that before.

Q. You didn't tell them that then at the time.

A. *I did not.*

Q. You told them nothing about the chain ladder at that time? A. *No.*

Q. *Nothing all that forenoon?*

A. I told them—

Q. After the man was dead you told them—that is it?

A. No, before.

Q. Did Pope ever tell Muset or Hegman about that ladder in your presence?

A. No; *I ain't, was there,* but he told them. They have got a blacksmith working at the mine; and a hoist, a shaft, and another shaft called the 'Glory Hole'; and a tramway and various other things; and different men in charge of these various things, and they were all under Mr. Pope."

The above is substantially all the evidence offered by the plaintiff in error in the trial of the cause, in the lower Court, from which counsel say: "It 'conclusively' appears that deceased was guilty of contributory negligence to the extent that the Court should have taken the case from the jury."

The record shows that even this is contradicted in every material part by the witnesses called in rebuttal.

Witness Olin at the bottom of page 82, Record, says all of these conversations spoken of by Pianfetti were to the effect that they had been promised a ladder, and the

ladder would be put down as soon as it was finished. And these were had just shortly before the accident. Muset, being called in rebuttal, says on page 83, Record: "This was the day before the accident happened. Jim said we will blast this out and put in a set of timbers and then take down the chain ladder, and that nothing was said about the ladder prior to that that he knew of." (It will be remembered that Muset was working on the same shaft with deceased at the time and prior to the accident.)

The next witness in rebuttal was Guy Falkner, on pages 84 and 85, Record, he says, speaking of the chain ladder:

"Q. You have been sworn before. State whether you were working in the blacksmith shop of the Seven Hundred on October 9th, 1900? A. Yes, sir.

Q. Were you working in the shop on that morning?

A. Yes, sir.

Q. State whether you saw a chain ladder there.

A. Yes, sir.

Q. State whether you had heard any conversation with Pope, the foreman, and the shift boss, Pianfetti, in relation to that ladder. A. Yes, sir.

Q. What was that conversation?

A. Mr. Pope told him the ladder was ready and to take it down at noon.

Q. What time of day was that?

A. Somewhere about eight o'clock in the morning.

Q. And the chain ladder, at that time, where was it?

A. In the shop.

Q. The accident occurred just a while before noon?

A. Yes, sir.

Q. State whether or not that chain ladder remained in the shop during the forenoon previous to the accident.

A. Yes, sir.

Q. Where was it lying?

A. Right near the door.

Q. State whether or not Mr. Pope was down during the day.

A. Yes, sir; he was in there during the day.

Q. Was the ladder in a position where he could have seen it from where he was? A. Yes, sir."

We certainly think that this testimony conclusively shows that there was no contributory negligence on the part of the deceased so far as the ladder is concerned. At all events if the evidence offered by plaintiff in error was of sufficient weight to require rebuttal at all, the evidence offered for that purpose was sufficient to raise an issue for the jury under the Court's instructions on this point. The evidence shows that the ladder (if a ladder was necessary—the evidence shows it was not) was not furnished for use until after the accident.

We think that the evidence conclusively shows that the plaintiff was not guilty of contributory negligence, at least not such negligence as would defeat his right of action. The witness Pianfetti testified (see Printed Record, page 74) that Pope gave the instructions to put the ladder down to him, as he was the boss of the gang that were at work in that shaft, and that neither Hegman, the deceased, nor Muset were there at the time. Whether or not Pianfetti was negligent in not putting the ladder down in accordance with the instructions of Pope is immaterial, as the rule of law is well settled both by the

state and federal courts that contributory negligence to defeat a right of action must be the negligence of the person injured, and that it is immaterial whether the negligence of a fellow laborer also contributed to the injury, so long as the master was also negligent and the negligence of the master contributed to the injury.

And while there was a strong conflict in the evidence in regard to the negligence of the deceased, in which case the verdict of the jury must be conclusive, we contend that even if it was through the negligence of the deceased that the ladder was not put down that fact would not bar the right of action. It is well established that the negligence of the plaintiff or the person injured in order to defeat the right of action must proximately and not remotely contribute to the injury. And it is not a proximate cause of the injury when the negligence of the person inflicting it is a more immediate efficient cause. "In jure non remota causa sed proxima spectatur." That is when the negligence of the person inflicting the injury is subsequent to, and independent of, the carelessness of the person injured, and ordinary care on the part of the person inflicting the injury would have discovered the carelessness of the person injured in time to have avoided its effects, and prevented injuring him, there is no contributory negligence, because the fault of the injured party becomes remote in the chain of causation. In such a case, the want of ordinary care on the part of the injured person is held not a judicial cause of his injury, but only a condition of its occurrence.

4 Am. & Eng. Enc. of Law, 25, 26, and 27, and cases there cited.

2 Thompson on Negligence, 1151 and 1157, where the leading English and American cases on this subject are cited and discussed.

Davies v. Mann, 2 Thompson on Negligence, 1105.

Radley v. The London etc. Co., 2 Thompson on Negligence, 1108.

Richmond etc. Railroad Co. v. Anderson, 31 Am. Rep. 750.

Kerwhacker v. Cleveland etc. R. R. Co., 62 Am. Dec. 246.

Zemp v. Wilmington etc. R. R. Co., 64 Am. Dec. 763.

Isbell v. New York etc. R. R. Co., 71 Am. Dec. 78.

Brown v. Hannibal etc. R. R. Co., 11 Am. Rep. 420.

We do not think that it will be seriously contended in this case that Mr. Pope would not have known that there was no ladder in the shaft had he exercised ordinary care or any care at all. On the morning of the day of the accident Pope told Pianfetti to take the ladder down at *noon*—the accident occurred just before noon. (See testimony of Guy Falconer, Printed Record, pages 84 and 85.) Just before the accident Pope was down in that very shaft, and as he came from there he told Muset to take down the hot iron as the boys were ready to blast. Shortly after that and just before the blasts were fired, Pope shut off the air and deprived those in the bottom of the shaft from what he must have known to be their only means of escape. (Record, 37, 38, 39.)

We think, therefore, that the trial court committed no

error in submitting the question of contributory negligence to the jury. First, because there was a conflict in the evidence; and secondly, because, even though all that counsel contends for in the evidence were true, there would have been no contributory negligence on the part of the deceased, the failure to put down the ladder being the remote and not the proximate cause of the injury, if it contributed at all, and the company having had ample opportunity, by the exercise of ordinary care, to ascertain that there was no ladder in the shaft before the air was disconnected.

The Court's ruling upon defendant's special answer in the nature of a plea in abatement was unquestionably sound. The appointment of plaintiff as administrator of the deceased seems to have been in accordance with the provisions of the Alaska Code in that regard. (Title II, chapters 79 and 81.) Besides, all court proceedings are entitled to all presumptions in favor of their validity.

The allegations of negligence found in the complaint are broad enough to justify the Judge's charge, and the evidence in the record is abundantly sufficient to sustain the verdict of the jury herein. Counsel complains of particular portions of certain instructions; but *take the entire charge,* as contained in the record (Record, 88), and what objection could be taken to it? Absolutely none, under counsel's own contention.

We respectfully submit that the judgment of the Court below should be affirmed with damages and costs.

L. S. B. SAWYER,
CREWS & HELLENTHAL,
Counsel for Defendant in Error.

No. 710.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ALASKA UNITED GOLD MINING CO.
Plaintiff in Error,

vs.

HENRY MUSET, as Administrator of the Estate of Edward Hegman, deceased,
Defendant in Error.

Points and Authorities of Plaintiff in Error on Motion to Dismiss and Additional Authorities on Merits of Case.

JOHN FLOURNOY,
Counsel for Plaintiff in Error.

Pernau Bros. Print, 543 Clay St., S. F.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

ALASKA UNITED GOLD MINING CO., Plaintiff in Error, vs. HENRY MUSET, as Administrator of the Estate of Edward Hegman, deceased, Defendant in Error.	No. 710

Points and Authorities of Plaintiff in Error on Motion to Dismiss and Additional Authorities on Merits of Case.

I.

THE MOTION TO DISMISS SHOULD BE DISMISSED FOR WANT OF SUFFICIENT NOTICE.

The record shows that notice of the motion to dismiss was served on counsel for plaintiff in error on October 18th, 1901. The case came on for hearing on October 22nd, 1901.

Rule 21 of this Court provides that notice of motions shall be served on the adverse party at least five days before the day noticed for the hearing.

We respectfully submit that under Par. 3 of Rule 21, the Court should dismiss the motion for want of sufficient notice.

II.

THE BILL OF EXCEPTIONS WAS PRESENTED FOR ALLOWANCE AND SETTLEMENT WITHIN THE TIME ALLOWED BY THE COURT, AND WAS THEREAFTER PROPERLY ALLOWED AND FILED.

1st. Judgment was rendered on March 16th, 1901. On that day the Judge made the following order: "And " now the said defendant requests forty days in which " to reduce his exceptions to writing and present same " for allowance and settlement by the Court, which said " time is allowed by the Court" (trans. p. 108).

2nd. The bill of exceptions was presented to the Judge on the 15th day of April, 1901, was approved by him on the 7th day of May, 1901, and filed on that day *nunc pro tunc* as of the 15th day of April, 1901 (trans. p. 109).

We contend that under the foregoing facts and the following authorities, the bill of exceptions was properly allowed:

1. *Ward* vs. *Cochran*, 150 U. S. 597:

"A bill of exceptions may be settled and signed

after the judgment term if within the time fixed by order of Court for the purpose."

NOTE. See this case for application of *Muller* vs. *Ehlers*, 91 U. S. 249.

2. *Talbot* vs. *Press Publishing Co.*, 80 Federal, 567 (N. Y. 1897):

"The Circuit Court has power to extend the time for making, filing and serving a bill of exceptions by an order entered *nunc pro tunc* as of a date before the expiration of the time allowed for the purpose, made after the expiration of the term at which the case was tried and judgment entered"
* * *

"Reference is made to *Muller* vs. *Ehlers*, 91 U. S. 249; *Bank* vs. *Eldred*, 143 U. S. 293; *Morse* vs. *Anderson*, 150 U. S. 156; *Ward* vs. *Cochran*, 150 U. S. 597, and it is urged that the Court has no power, after a term has expired, to extend the time for making, etc., bill of exceptions, even within the period allowed by statute for suing out a writ of error. Inasmuch as the exceptions were all taken, noted by the Judge and reduced to writing at the trial, and the bill of exceptions is merely the convenient form in which they are reproduced for the court of review, such a hide-bound practice would often work great injustice. The decision in *Chateaugay Ore & Iron Co.*, 128 U. S. 544, has recognized a more liberal rule as applicable in this district."

3. *In re Chateaugay Ore & Iron Co.*, 128 U. S. 544:

"The fact that the term expired before the exceptions were perfected, is immaterial, as the Federal Circuit Court rules do not limit the time in which exceptions may be prepared to the session of the Court."

NOTE. See this case for application of *Muller* vs. *Ehlers*.

4. *United States* vs. *Breitling*, 20 Howard 252:

> "This Court has repeatedly said that where an exception has been taken at the trial to a ruling of the Court, it may be reduced to writing and signed by the Judge afterwards, and indeed after the term * * *. The Court may suspend its own rule in this as in other cases in aid of justice."

5. *S. P. Co.* vs. *Hamilton*, C. C. A. 9th Circuit, 54 Federal 474:

> "The defendant in error claims that the writ of error in this case should be dismissed 'because no bill of exceptions or statement, as required by the rules of the Circuit Court for the District of Nevada, in support of the motion for a new trial, was ever made or presented to the Judge of said Court within the time required by the rules of practice thereof, or was ever filed in said Court, or settled, until after the motion of the plaintiff in error for new trial was heard and denied'. But the exceptions of the defendant were reduced to form and filed with the clerk at the trial, and before the jury retired, and a formal bill of exceptions filed within the time granted by the Court. It was afterwards settled and approved by the Court as containing a correct statement of the case. Besides, it is within the power of the Court to suspend its own rules, or to except a particular case from them, to subserve the purpose of justice (*U. S.* vs. *Breitling*, 20 Howard 252. See also *Dredge* vs. *Forsyth*, 2 Black 568, and *Kellogg* vs. *Forsyth*, *id.* 573)".

NOTE. In *Bank* vs. *Eldred*, 130 U. S. 693; *Miller* vs. *Morgan*, 67 Federal, 82; *Muller* vs. *Ehlers*, 91 U. S. 249; *U. S.* vs. *Jones*, 149 U. S. 262; the records show

that the bills of exceptions were allowed after the close of the term without authority or any standing rule or the consent of the parties and not within the time allowed by order of Court.

III.

THE FACT THAT THE SUPERSEDEAS BOND WAS DATED APRIL 12TH, 1901, FILED APRIL 17TH, 1901,—HAVING BEEN DULY APPROVED BY THE JUDGE—AND THAT THE WRIT OF ERROR WAS DATED APRIL 15TH, AND FILED APRIL 17TH—HAVING BEEN DULY ALLOWED BY THE JUDGE—IS AN IMMATERIAL IRREGULARITY, AS THE COURT WILL PRESUME THAT IT WAS RE-APPROVED UPON THE ISSUANCE OF THE WRIT.

We respectfully submit the following authority in support of the above proposition:

1. *McClellan* vs. *Pyeatt*, C. C. A. 8th Circuit, 49 Federal 259:

FACTS. Judgment July 8th, 1891; supersedeas bond presented to the Judge July 29th, 1891, and filed July 30th, 1891; August 15th, 1891, writ of error was allowed and the citation duly signed.

HELD. "We are asked to dismiss the writ of error mainly on the following grounds: * * * because the bond antedates the writ of error and is otherwise irregular and defective." * * *

"The objections taken to the bond are not ade-

quate to warrant us in dismissing the writ of error or in vacating the supersedeas. If there are defects in the bond, we have undoubted authority to allow a bond to be given which shall cure such defects. But, in view of the nature of the objections made to the bond, we are of the opinion that it is not necessary to require another bond to be given. It is made payable to the proper parties, it contains the proper statutory conditions under Section 1000 of the Revised Statutes of the United States, and no objection is made to it on the ground that the penalty or the sureties are insufficient to secure the debt, damages and costs, if the plaintiffs in error fail to prosecute their writ to effect. The sole objections to it seem to be that it was taken and approved by the lower Court before a writ of error was sued out, and that it is not signed by both of the plaintiffs in error. Section 1007 evidently contemplates that security shall be taken when the citation issues; and such is the usual and proper practice. It was irregular, therefore, to take, approve, and file a supersedeas bond reciting the allowance of a writ of error before any such writ had in fact been allowed. But it was competent for the Court to re-approve the bond on the issuance of the citation, and such approval may be inferred or presumed, and we think it ought to be conclusively presumed from the subsequent issuance of the citation and allowance of the writ of error."

If the bond is not valid, the defendant in error should ignore it and apply for process to satisfy his judgment. This method would at least tend to demonstrate counsel's faith in his views of the law.

IV.

THE CONTENTION OF DEFENDANT IN ERROR, BASED UPON THE FACT THAT THE WRIT OF ERROR WAS GRANTED AND FILED APRIL 17TH, 1901, AND THE ASSIGNMENTS OF ERROR WERE NOT FILED UNTIL MAY 7TH, 1901, IS, WE THINK, UNDER RULE 11 OF THIS COURT, AND IN VIEW OF THE DECISIONS, SOUND. WE, HOWEVER, RESPECTFULLY CONTEND THAT DEFENDANT IN ERROR IS NOT NOW IN POSITION TO TAKE ADVANTAGE OF THIS VIOLATION OF THE RULE OF THE COURT FOR THE FOLLOWING REASONS:

1. The record (page 31) shows that on the 7th of May, 1901, the plaintiff in error made a motion for leave to withdraw the writ of error and to correct all the proceedings now complained of by defendant in error, and that defendant in error filed written exceptions to and opposed this application.

2. In *Frame* vs. *Portland Gold Mining Co.*, 108 Federal, 750, Circuit Court of Appeals, 8th Circuit (Colorado, April, 1901), the Court used the following language:

> " In the early history of this Court attention was sharply called to this rule, and the announcement was clearly made that it would be enforced, although in the early cases in which its enforcement was invoked we carefully examined the errors assigned in order that no injustice might result from the application of the rule."

The counsel for plaintiff in error were at fault in not

filing assignments of error according to the rule of the Court, but in view of the opposition of the defendant in error to the effort to correct this fault, we do not think that the defendant in error is now in position to invoke a strict enforcement of the rule. He should not be permitted to hold us in the Circuit Court when we wished to correct an error, and then force us out of this Court because the error was not corrected.

As under the circumstances it is not probable that the Court would in any event inflict a severer penalty than a dismissal of the appeal without prejudice, and as under the laws of Alaska plaintiff in error has one year from the 16th day of March, 1901, in which to take its appeal, we respectfully request the Court to extend to plaintiff in error the leniency shown in the earlier cases where a strict enforcement of the rule was invoked, and thus relieve us from the expense and delay of suing out a new writ of error and filing new assignments of error.

ADDITIONAL AUTHORITIES ON MERITS OF CASE.

The plaintiff in error respectfully submits the following additional points and authorities:

1st. THE ONLY NEGLIGENCE CHARGED IN THE COMPLAINT IS THAT OF MR. POPE, THE FOREMAN, IN CUTTING OFF THE AIR, AND THUS STOPPING THE OPERATION OF THE HOIST (trans. 9).

NOTE: There is no charge that the company did not furnish Mr. Hegman a reasonably safe place to work, or that it did not furnish him with suitable tools and appliances with which to work, or that it did not use due care in the selection of fit and competent fellow employees.

2nd. WHEN MR. POPE CUT OFF THE AIR, HE WAS NOT DISCHARGING ANY PERSONAL AND POSITIVE DUTY OWED BY THE COMPANY TO MR. HEGMAN WHICH HAD BEEN DELEGATED TO HIM, AND WAS, NOTWITHSTANDING HE HAD THE RANK OF FOREMAN, A FELLOW SERVANT WITH MR. HEGMAN.

It is conceded that a master owes his servant the following personal and positive duties: To furnish him a reasonably safe place to work, and with suitable tools and appliances with which to work, and to use due care in the selection of fit and competent fellow employees.

It is also conceded that a master may delegate these duties to another, and that such delegation does not in any manner affect the responsibility of the master for

their proper performance.

It is claimed, however, that the servant to whom the performance of these duties has been delegated is the vice principal of the master only while discharging such duties and that he is a fellow servant with other servants in respect to all other acts which he may perform.

The vice principal may not be a superior servant in the sense in which that term is used in the law of fellow servants. The status of a servant as a vice principal does not depend upon his rank or the grade of his employment, but wholly upon the character of the duties which he performs.

A servant in the performance of one of the master's personal duties is a vice principal, regardless of whether he occupies a position superior or inferior to that of other servants.

The negligence of a servant, who may be a vice principal while in the discharge of the personal duties of a master, will not charge the master with liability to a fellow servant when such negligence occurs in the discharge of the ordinary duties of such servant.

We refer, in addition to the cases cited in the opening brief, to the following authorities in support of the foregoing contention:

1. *New England R. R. Co.* vs. *Conroy*, 175 U. S. 323:

The Court here reviews many cases on the subject of who are fellow servants, and especially *Baltimore & O. R. Co.* vs. *Baugh*, 149 U. S. 368, and *Chicago, M. & St. R. R. Co.* vs. *Ross*, 112 U. S. 377.

I call the special attention of the Court to the following portion of that decision:

> "In so far as the decision in the case of Ross is to be understood as laying it down, as a rule of law to govern in the trial of actions against railroad companies, that the conductor, merely from his position as such, is a vice principal, whose negligence is that of the company, it must be deemed to have been overruled, in effect if not in terms, in the subsequent case of *Baltimore & O. R. Co.* vs. *Baugh*, before cited. There Mr. Justice Brewer, in commenting upon the proposition applied in the *Ross case*, that the conductor of a train has the control and management of a distinct department said:
>
> " 'But the danger from the negligence of one specially in charge of the particular work is as obvious and as great as that of those who are simply co-workers with him in it, each is equally with the other an ordinary risk of the employment. If he is paid for the one, he is paid for the other; if he assumes the one, he assumes the other. Therefore, so far as the matter of the master's exemption from liability depends upon whether the negligence is one of the ordinary risks of the employment, and, thus assumed by the employee, it includes all co-workers to the same end, whether in control or not. But if the fact that the risk is or is not obvious does not control, what test or rule is there which determines? Rightfully this, there must be some personal wrong on the part of the master, some breach of positive duty on his

part. If he discharges all that may be called positive duty, and is himself guilty of no neglect, it would seem as though he was absolved from all responsibility, and that the party who caused the injury should be himself alone responsible.'"
* * *

2. *Stevens* vs. *Chamberlin*, 100 Federal 378, C. C. A. 1st Circuit, 1900:

"It should be observed that since the case was tried by the jury the Supreme Court has decided *Railroad Co.* vs. *Conroy*, 175 U. S. 323, in a manner which clears up some questions which were before doubtful. There may, of course, be instances where the question whether or not different individuals are co-employees for the purpose of the issue in this case should be submitted to the jury for their determination on proper instructions from the Court; but, on facts which are so far from dispute as those in the record at bar, the practice of the Supreme Court has been to dispose itself of that question, or to direct the Circuit Court to dispose of it, as a question of law, or as one not contestible on the proofs in the case. This was emphatically so in *Railroad Co.* vs. *Conroy*, *ubi supra*. The only other cases relating to this point to which we need refer are *Railroad Co.* vs. *Keegan*, 160 U. S. 259; *Railroad Co.* vs. *Peterson*, 162 U. S. 346; *Martin* vs. *Railroad Co.* 166 U. S. 399; *Mining Co.* vs. *Whelan*, 168 U. S. 86."

After referring to *Alaska Treadwell Gold Mining Co.* vs. *Whelan*, 168 U. S. 86, the Court continues:

"As to the main question in this case, it is useless to burden an opinion with citations from the state courts, where the views have been so conflicting, and the expressions of them almost innumerable; also, where so much has been said on

this topic in the various opinions of the several Justices of the Supreme Court, speaking in behalf of that Court, it would not be prudent to accept any particular expression as settling the law beyond what the case itself demanded. Nevertheless, it may well be maintained that the alleged rule of vice principal, so far as it concerns the relations of different persons employed by the same principal to accomplish a common result, has no proper recognition by the Supreme Court with reference to the issue in this case, as we have pointed it out. On the question of who are co-servants, it was said by Justice Brewer in *Railroad Co.* vs. *Baugh*, 149 U. S. 368, 387, as follows:

> " 'If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor.' " * * *

NOTE: We submit that the facts in the case at bar are so far from dispute that under the authority of this case it was clearly error for the Court to refuse to instruct the jury to find a verdict for the defendant.

3. *Louisville & N. R. Co.* vs. *Stuber*, 108 Federal 934 C. C. A. 1st Circuit, 1901:

> "The general rule is that a master is not liable for an injury sustained by one servant through the negligence of another in the same general service, in the absence of negligence of the master in respect to those duties which he is universally regarded as having assumed toward his servants, such as the obligation to exercise care in the selection of those to be associated with him, or of a place to carry on his work, and proper tools or

materials with which he is to do it; and there is no sanction in the controlling authorities for taking a case out of the general rule of nonliability for the negligent acts of another servant by refined distinctions as to who are fellow servants, based upon the subordination of one servant to another or upon the circumstances that two servants are engaged in different departments of a common service."

4. *McDonald* vs. *Buckley*, 109 Federal 290, C. C. A. 5th Circuit, 1901:

"A general foreman, employed by contractors, and having charge of the work of putting in the foundations for a wharf, and of all employes engaged in the work, with power to employ and discharge, while engaged in the actual work of directing the operations of a pile driver, giving the signals to the engineer for the fall of the hammer, is a fellow servant with the other members of the pile-driver gang; and any negligence committed by him while thus working, resulting in injury to another workman, is his own personal negligence, for which the master is not responsible, where there was no negligence of the master in his selection."

5th. *Lochbaum* vs. *Oregon Ry. & Nav. Co.*, 104 Federal 852, C. C. A. 9th Circuit, 1900:

"A section foreman on a railroad, who is under a division road master having authority to direct the work and inspect the same, and who is required to report to a general road master, who in turn reports to the general superintendent, is a fellow servant with the men working under him, whether or not he has authority to hire and discharge them; and the company is not liable for any injury to one of the men resulting from his negligence."

NOTE: The Court in the above case cites as authority

Mining Co. vs. *Whelan*, 168 U. S. 68.

The material inquiry in cases of this character is as to the nature of the act causing the injury and not as to whether the negligent servant was the superior of the injured servant, or as to the degree in rank of the negligent servant above the injured servant.

We contend that, tested by this rule, which has been established by recent decisions of the Supreme Court and applied in the decisions of the Circuit Courts of Appeals in the First, Fifth and Ninth Circuits, Mr. Pope was, when he cut off the air, a fellow servant of Mr. Hegman; that he was not then in the discharge of any positive duty which the company owed to Mr. Hegman, and that the company cannot be held liable for the injury.

We respectfully submit that the Court erred in refusing to instruct the jury to render a verdict for defendant and that the judgment should be reversed and a new trial granted.

JOHN FLOURNOY,
Counsel for Plaintiff in Error.

No. 713

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

F. W. COLER,

Appellant,

vs.

HENRY F. ALLEN, JOHN H. McGRAW, as Receiver, and PACIFIC NORTHWEST PACKING COMPANY (a Corporation), and THE PACIFIC NORTHWEST PACKING COMPANY (a Corporation),

Appellees.

TRANSCRIPT OF RECORD.

Appeal from the Circuit Court of the United States for the District of Washington, Northern Division.

FILMER-ROLLINS CO. PRINT, 424 SANSOME STREET, S. F.

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In the Circuit Court of the United States, for the Northern Division of the District of Washington.

IN EQUITY.

HENRY F. ALLEN,
Complainant,
vs.
PACIFIC NORTHWEST PACKING COMPANY (a Corporation), THE PACIFIC NORTHWEST PACKING COMPANY (a Corporation), AUSTIN CLAIBORNE, W. M. WILLIAMS and W. A. KEENE,
Defendants.
No. 872.

Bill of Complaint.

To the Honorable Judges of the Circuit Court of the United States, for the Northern Division of the District of Washington, Sitting in Equity:

Your orator, who is, and at all times herein mentioned, has been, a citizen of the State of California, brings this, his bill of complaint, against the defendants above named, and each of them.

Thereupon your orator complains and says:

That the defendants Austin Claiborne, W. M. Williams, and W. A. Keene, are and each of them is, a citizen of the State of Washington, each residing and having his place of abode in the State of Washington,

I.

Ia.

That your orator is, and at all the times herein mentioned has been a citizen of the State of California, residing in and having his place of abode in the said State of California.

II.

That the defendant Pacific Northwest Packing Company is, and at all the times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Washington, and having its place of business and doing business in the said State of Washington.

III.

That the defendant The Pacific Northwest Packing Company is, and at all the times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Washington, and having its place of business and doing business in the said State of Washington; that the said last-named defendant, The Pacific Northwest Packing Company, was organized as, and has become and is the successor in business of the first named defendant, Pacific Northwest Packing Company, and since its organization has become the owner of all of the property, of every kind, nature and description whatsoever, at any time owned by the defendant Pacific Northwest Packing Company, and has carried on, and is now carrying on the business formerly carried on by the defendant Pacific Northwest Packing Company, and has duly and legally assumed and become obligated to pay all of the indebtedness of every kind, nature, and description whatsoever, at any time contracted by the

said first named defendant Pacific Northwest Packing Company.

IV.

That heretofore, to wit, on the 20th day of October, 1898, the defendant Pacific Northwest Packing Company was indebted to your orator in the full and just sum of $2,000, and that on the said date said defendant, acting through its president and its secretary, who were thereunto duly authorized, empowered, and directed by its board of trustees, duly made, executed, and delivered to your orator its promissory note, for the purpose of evidencing the said indebtedness and the terms of its payment, for the principal sum of $2,000, dated at Seattle, Washington, October 20th, 1898, wherein and whereby it promised and agreed to pay on October 20th, 1899, after date without grace to the order of your orator, the principal sum of $2,000, with interest at the rate of ten per cent per annum from the date thereof until paid, and providing that in case suit or action should be instituted to collect the said note, or any portion thereof, it would pay such an additional sum as the Court might adjudge reasonable, as attorneys' fees in such suit or action.

That on the said 20th day of October, 1898, the defendant Pacific Northwest Packing Company was further indebted to your orator in the full and just sum of $13,000, and that on said date said defendant, acting through its president and secretary, who were thereunto duly authorized, empowered and directed by its board of trustees, duly made, executed and delivered to your orator its promissory note, for the purpose of evidencing the

said indebtedness and the terms of its payment, for the principal sum of $13,000, dated at Seattle, Washington, October 20th, 1898, wherein and whereby it promised and agreed to pay, on October 20th, 1899, after date, without grace, to the order of your orator, the principal sum of $13,000, with interest at the rate of ten per cent per annum from the date thereof until paid, and providing that in case suit or action should be instituted to collect the said note, or any portion thereof, it would pay such an additional sum as the Court might adjudge reasonable, as an attorney's fee in such suit or action. That on the said 20th day of October, 1898, the defendant Pacific Northwest Packing Company, acting as aforesaid by and through its president and secretary, who were thereunto duly authorized, empowered, and directed by its board of trustees, duly made, executed, signed, sealed, acknowledged, and delivered to your orator, for the purpose of securing the payment of the promissory notes hereinabove described, its indenture of mortgage, wherein and whereby it granted, bargained, sold, aliened, released, conveyed, confirmed and mortgaged unto your orator, and unto his heirs, executors, administrators and assigns, all of the following described property, to wit:

A certain lease dated the 14th day of May, 1898, made by the State of Washington to said defendant Pacific Northwest Packing Company, whereby the State of Washington leases to the said defendant a certain portion of the harbor area in front of blocks 88 1-2 and 89, in the town of Blaine, beginning at the west corner of block 89, Blaine tide lands, on inner harbor line, thence south 26 degrees, 56 minutes east, 181.5 feet, south 16

degrees, 49 minutes east, 66.2 feet, being all the harbor area lying westerly of said frontage between the inner and outer harbor lines, and which property is situated in Whatcom County, State of Washington, and also the wharf, cannery buildings, erections and all other structures on said above-described leased premises, and also all the right, title and interest the said defendant has in or to that certain piling, roadway or approach to the wharf and other structures above mentioned from the main upland to said wharf and other structures, which said approach connects said wharf and other structures with the upland, also the entire canning, packing and operating plant of said defendant situated in, on, or about said above-described premises and consisting of the following described personal property, to wit:

1 steel lye kettle.
2,026 can trays.
4 testing tanks.
4 pair lobster scales.
1 post drill.
4 mending tables.
6 soldering irons.
8 washing-tanks.
14 filling tables.
4 weighing tables.
1 fresh water washing-tank.
6 bathroom low trucks.
1 steamboat truck.
8 lacquer vats.
20 testing tubes.
98 soldering irons.
4 butcher tables.
8 fish trucks.
4 topping tables.
2 salting tables.
3 drain tables.
250 feet rubber hose.
3 bundles tissue paper.
100 lbs. bar copper.
1 ton salt.
1,668,000 labels.
4 dories.
4 patented steam boxes complete with fittings.
2 soldering machines complete, bricked in.
2 adjustable can chutes.
2 rotary crimpers.
1 can conveyor, 10 inches.

1 can conveyor, 4 inches.
1 set Gang fish knives.
1 grind-stone.
1 steam pump brass lined.
1 air pump.
1 pressure gauge.
1 relief valve.
12 extra oil tips.
1 box ball and cock.
2 blacksmith's vices.
28 retort cars.
1 solder mold.
4 turntables.
10 fish boxes.
37 bundles tissue paper.
7 tons solder.
30 carboys acid.
323,000 salmon cans.
6 scows.
1 brick-yard boiler built in brick.
4 steel retorts, complete with fittings.
2 acid machines, complete.
1 Letson-Burpee washing-machine.
1 Hanthorn washing-machine.
1 rotary fish cutter.
1 fish elevator.
1 steam-engine, with fittings.
1 galvanized iron air-tank.
6 double-mouthed coal oil fire pots.
12 lever handle stopcocks.
12 charcoal fire pots.
12 extra air tips.
1 blacksmith's anvil and forge.
1 blacksmith's sledge hammer.
381 retort coolers.
150 feet overhead track complete, with travelers and tackle.
3 testing tanks.

All shafting, belting, pulleys, piping and all other personal property of every kind or character situated in, on or about any of the above-described premises.

That in said indenture of mortgage it was particularly recited and agreed that the above and foregoing more particular description of personal property contained in said indenture of mortgage was not intended to limit the lien of the said mortgage to said property only, but that it was the intention of the defendant Pacific Northwest Packing Company that all other personal property which

might not be particularly described in said indenture of mortgage, but which was or should be used in connection with or in the enjoyment of the cannery plant of the defendant, was intended to be and should be covered by the said indenture of mortgage, in like manner as though it were also particularly described therein.

That in said indenture of mortgage it was further covenanted and agreed that your orator should have and hold all and singular the said property, and every part and parcel thereof, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and also all the rents, issues and profits arising therefrom, and all the easements, franchises, and privileges connected therewith or appertaining thereto, unto your orator, and unto his heirs, executors, administrators or assigns, to his and their own benefit and behoof forever.

That in said indenture of mortgage it was particularly recited that the same was intended as a mortgage to secure the payment of the sum of $15,000, and interest thereon at the rate of ten per cent per annum from the 20th day of October, 1898, the same being the loan evidenced by the two promissory notes hereinabove described, for $2,000 and $13,000, respectively.

That in said indenture of mortgage it was further provided that if the said defendant should well and truly pay the said notes, and all principal and interest thereon at their maturity, according to their tenor, and should meanwhile promptly pay all taxes which might be assessed or levied upon the property above described and

mortgaged, or intended so to be, and should keep the buildings, structures, fixtures, and improvements thereon, and all of the property above described or on the premises above described, or used in connection therewith, insured in responsible fire insurance companies to be approved by the mortgagee, in a sum not less than seventeen thousand dollars, the loss, if any, to be paid to the mortgagee, his heirs, executors, administrators, and assigns, and should promptly pay all premiums which might be required to keep said property so insured, and should pay and discharge promptly all expenses of taking care of and of operating and of keeping in good repair all of the property above described and thereby mortgaged, or intended so to be, and should observe and perform all of the things in said indenture provided to be observed and performed on its part, then the said indenture should be void, but otherwise, and until all of such payments should be fully paid, the said indenture should stand as a mortgage for the full payment of the principal and interest of all of said indebtedness, and of the premiums to effect and keep in force the insurance on the property mortgaged, or intended so to be, and the taxes thereon, and all assessments thereon, and of all reasonable costs and expenses which might be incurred in caring for said property, and in keeping the same in repair.

And it was further provided in said indenture of mortgage that if the defendant Pacific Northwest Packing Company should fail to promptly pay the taxes and assessments which might be assessed or levied upon said

property, or upon any part thereof, or should fail or neglect at any time to pay the premiums required for keeping the same insured, as in said indenture specified, or should fail or neglect to pay the said indebtedness, or to pay any installment of interest thereon, or in case your orator should at any time consider his security for said indebtedness insufficient, or his debt insecure, then and in any of said events it should be lawful for your orator, and the said defendant did in said indenture expressly authorize and empower your orator in such event to immediately foreclose the said mortgage, and to cause the whole or any part of said property to be sold, or so much thereof as might be necessary to pay the costs and expenses of such sale, and of such foreclosure, the taxes and assessments upon said property, the insurance premiums and the indebtedness in said indenture provided for and remaining unpaid at the time of foreclosure and sale, and also a reasonable fee for the attorneys or counsel representing your orator in the suit or action which he should prosecute to foreclose said mortgage, rendering the surplus, if any there should be, whether of property or of money, to the said defendant, its successors and assigns.

That in said indenture of mortgage it was further provided that any sums which your orator might advance or pay for discharging any taxes assessed or levied upon any of the said mortgaged property or any part thereof, or by way of premiums to keep said property insured, should be secured by the said mortgage, and should bear interest from the dates of payment at the rate of ten per cent per annum.

That in said indenture of mortgage it was further provided that should your orator for any reason find it necessary to institute a suit or action to foreclose the said mortgage, there should be appointed, at the option of your orator, a receiver to take charge of and to take possession of all of the mortgaged property, and to care for and keep the same in repair and to operate the packing plant now thereon, if in the judgment of your orator or of the Court having jurisdiction of such suit, it should be advantageous, necessary or expedient so to do, and that the costs, charges, fees, expense, compensation and disbursements of such receiver should be a charge and lien on the said mortgaged property, and the payment of the same, and the whole thereof should be secured by the said mortgage in like manner as the mortgage debt; and that in addition thereto, and that in addition to the mortgage debt and the sums which should have been paid by your orator, your orator in such suit in addition to the costs, expenses, and disbursements of such suit should be entitled to recover a reasonable sum for the compensation of the attorneys, solicitors or counsel representing him in such suit, the same to be fixed by the Court, and that such sum should be a part of the costs and expenses, and be made a lien upon the mortgaged property in any judgment which should be recovered in such suit or action, and that the said indenture of mortgage should be held as security for the payment of the same.

That in said indenture of mortgage it was further covenanted and agreed that in case the proceeds of the prop-

erty thereby mortgaged, or intended so to be, should be insufficient to pay and discharge all of the sums secured thereby, that then the said defendant should, and it did in said indenture expressly covenant and agree to immediately pay to your orator the residue of such indebtedness so remaining unpaid, and for such purpose, and with such object in view, and in order to more fully protect your orator in the premises, said defendant did expressly agree to waive, and did waive, all provisions in its favor contained in section 5888a of the laws of the State of Washington as compiled and annotated by the Honorable R. A. Ballinger.

That the said indenture of mortgage was signed by Pacific Northwest Packing Company by Wm. C. McKee, its president, and that the corporate seal of the said defendant was imprinted upon the said indenture of mortgage, and the execution of the said mortgage and the sealing thereof were duly attested by Harwood Morgan, secretary of the said defendant, all in the presence of two witnesses who subscribed their names as witnesses to the execution thereof to the said mortgage. That United States internal revenue documentary stamps, duly canceled in the manner prescribed by law, and to the full amount required by law, were attached to the said indenture of mortgage. That the execution of the said mortgage was duly and legally acknowledged by the president and secretary of the said defendant before a notary public in and for the State of Washington, duly commissioned and sworn, in all respects in accordance with the requirements of the laws of the State of Wash-

ington for the acknowledgment of mortgages upon real property, and the said acknowledgment was duly certified to in writing upon the said indenture of mortgage by the said notary public, and his certification thereof was attested by the notarial seal of the said notary upon the said indenture of mortgage. That at the time of and as a part of the execution of the said mortgage, the said president and secretary of the said defendant duly took and subscribed an oath before a notary public in and for the State of Washington, to the effect that the said indenture of mortgage was made in good faith, and for an actual existing indebtedness, and was not made with any design to hinder, delay or defraud any creditor or creditors, which oath was duly attested by the notary public before whom the same was taken, over his signature and notarial seal.

That thereafter, to wit, on the 20th day of October, 1898, the said indenture of mortgage was duly filed for record in the office of the auditor of Whatcom county, Washington, and was there recorded in the manner prescribed by law, at page 513 of volume 29 of the records of Real Estate Mortgages of said county, and at page 200 of volume G of the Chattel Mortgage Records of said county.

V.

That for the purpose of securing the note hereinabove described, dated October 20th, 1898, for the principal sum of $2,000, the said defendant Pacific Northwest Packing Company, acting through its president and secretary thereunto duly authorized, empowered and di-

rected by its board of trustees, did, on the 20th day of October, 1898, duly make, execute, acknowledge, swear to and deliver to your orator a certain indenture of mortgage, wherein it mortgaged to your orator the vessel called "Albert Lea," together with the mast, bowsprit, boat, anchors, cables, chains, rigging, tackle, apparel, furniture, and all other necessaries thereunto appertaining and belonging. That from the said indenture of mortgage it appears that the register of the said vessel is No. 152, and that the official number of said vessel is 106,609. That in the said indenture of mortgage it is expressly stipulated that the same is made to secure the payment of a promissory note for the principal sum of $2,000, hereinabove described, with interest and attorneys' fees as therein provided, and that in case default shall be made in such payments, or in any of such payments, or if default shall be made in the prompt and faithful performance of any of the covenants in said mortgage contained, that then your orator shall be entitled to take possession of the said vessel, and all of her appurtenances, wherever found, and to sell and convey the same, or so much thereof as may be necessary to satisfy the said debt, interest and reasonable expenses, after first giving notice of twenty days, to be given by publication in some newspaper published in Whatcom county, Washington, and to retain the same out of the proceeds of such sale, the surplus, if any, to belong to and be returned to the said defendant or its successors.

That the said indenture of mortgage was signed by the said defendant Pacific Northwest Packing Company,

by Wm. C. McKee, as president, and the corporate seal of the said defendant was imprinted upon said mortgage, and the execution and sealing thereof were duly attested by Harwood Morgan, secretary of said defendant, and the execution and sealing of said mortgage was witnessed by two witnesses, who subscribed their names upon said mortgages as attesting witnesses to the execution thereof; and the execution of the said mortgage was duly and legally acknowledged by the president and secretary of the said defendant on the said 20th day of October, 1898, before a notary public in and for the State of Washington, residing at New Whatcom, Washington, and the said acknowledgment was duly certified in writing upon the said mortgage by the said notary public over his hand and notarial seal.

That at the time of the execution of said mortgage, the president and secretary of the said defendant took and subscribed an oath before a notary public in and for the State of Washington, residing at New Whatcom in said State, to the effect that the said mortgage was made in good faith, and for an actual, existing indebtedness, and without any design to hinder or delay or defraud any creditor or creditors, and that the said oath was duly certified upon said indenture of mortgage, by the said notary, over his hand and notarial seal.

That the said indenture of mortgage was thereafter and on the 22d day of October, 1898, filed for record in the collector's office of the District of Port Townsend, and there recorded and now there of record at page 78 of book 5 of Mortgages.

VI.

That heretofore, and on, to wit, the 11th day of May, 1900, the defendant The Pacific Northwest Packing Company was indebted to your orator in the full and just sum of $25,734.00, and that on said date the said defendant The Pacific Northwest Packing Company, acting through its president and its secretary, who were thereunto duly authorized, empowered and directed by its board of trustees, for the purpose of evidencing the said indebtedness and the terms of its payment, duly made, executed and delivered to your orator its promissory note for the principal sum of $25,734.00, dated at Seattle, Washington, May 11, 1900, wherein and whereby it promised and agreed to pay, on demand, to the order of your orator, after date, without grace, the principal sum of $25,734.00, with interest at the rate of ten per cent per annum from the date thereof until paid, and providing that in case suit or action should be instituted to collect the said note, or any portion thereof, it would pay such an additional sum as the Court might adjudge reasonable, as attorneys' fees in such suit or action.

That on the said 11th day of May, 1900, your orator, acting wholly and solely at the instance and request of the said defendant The Pacific Northwest Packing Company, promised and agreed, to and with the said defendant The Pacific Northwest Packing Company, that he would thereafter, and on, to wit, the 15th day of May, 1900, advance and loan to the said defendant, to be used in its business, the further sum of $6,687.50; and the said defendant on the said day, for the purpose of evidencing

the said loan so to be made and the terms of the payment thereof, and acting through its president and secretary, who were thereunto duly authorized, empowered and directed by its board of trustees, made, executed and delivered to your orator its certain promissory note in writing, for the principal sum of $6,687.50, dated at Seattle, Washington, May 15th, 1900, wherein and whereby the said defendant promised and agreed to pay to your orator, on demand, after date, without grace, the principal sum of $6,687.50, with interest thereon at the rate of ten per cent per annum from date until paid, and with like provisions regarding attorneys' fees as contained in the note in this paragraph first above mentioned.

That on the said 11th day of May, A. D. 1900, the said defendant The Pacific Northwest Packing Company, acting, as aforesaid, by and through its president and secretary, who were thereunto duly authorized, empowered, and directed by its board of trustees, duly made, executed, signed, sealed, acknowledged and delivered to your orator, for the purpose of securing the payment of the promissory notes hereinabove in this paragraph described, and for the purpose of securing the payment to your orator of further sums to be loaned and advanced to the said defendant by your orator, and for the other purposes therein described, its indenture of mortgage, wherein and whereby it granted, bargained, sold, aliened, released, conveyed and confirmed and mortgaged unto your orator, and unto his heirs, executors, administrators and assigns, all of the following described property, to wit:

A certain lease, dated the 12th day of June, 1899, made by the State of Washington to Pacific Northwest Packing Company, a corporation organized under the laws of the State of Washington, of which corporation the said defendant The Pacific Northwest Packing Company is the successor, of a certain portion of the harbor area in front of blocks 88 1-2 and 89, in the town of Blaine, beginning at the west corner of block 89, Blaine tide lands, on inner harbor line; thence south 26 degrees 46 minutes east one hundred eighty-one and 8-10 (181.8) feet, south sixteen degrees (16 deg.) forty-nine minutes (49 minutes) east, sixty-six and 2-10 (66.2) feet, being all the harbor area lying westerly of said frontage between the inner and outer harbor lines, and which property is situated in Whatcom county, State of Washington, and also the wharf, cannery buildings, erections and all other structures on said above-described leased premises, and also all the right, title, and interest the said defendant The Pacific Northwest Packing Company has in or to that certain piling, roadway or approach to the wharf and other structures above mentioned from the main upland to said wharf and other structures, which said approach connects said wharf and other structures with the upland, also the entire canning, packing and operating plant of said The Pacific Northwest Packing Company, situated in, on, and about said above-described premises, and particularly the following described personal property, to wit:

1 steel lye kettle.
2026 can trays.
4 testing tanks.
4 pair lobster scales.
1 Post drill.
4 mending tables.
6 soldering irons.
8 washing tanks.
14 filling tables.
4 weighing tables.
3 drain tables.
250 feet rubber hose.
21 scows.
1 brickyard boiler—built in brick.
4 patented steam boxes, complete with fittings.
1 fresh water washing tank.
6 bath room low trucks.
1 steamboat truck.
8 lacquer vats.
20 testing tubes.
98 soldering irons.
4 butcher tables.
8 fish trucks.
4 topping tables.
2 salting tables.
10 fish boxes.
2,500,000 labels.
4 dories.
2 soldering machines complete, bricked in.
2 adjustable can chutes.
2 rotary crimpers.
1 No. 10 can conveyor.
1 No. 4 can conveyor.
1 set Gang fish knives.
1 grindstone.
1 steam pump brass lined.
1 air pump.
1 pressure gauge.
1 relief valve.
12 extra oil tips.
1 box ball and cock.
2 blacksmith's vices.
28 retort cars.
1 solder mold.
4 turn tables.
2 acid machines complete.
1 Letson-Burpee washing machine.
1 Hanthorn washing machine.
1 rotary fish cutter.
1 fish elevator.
1 steam engine with fittings.
1 galvanized iron air tank.
6 double-mouthed coal oil fire pots.
12 lever handle stop cocks.
12 charcoal fire pots.
12 extra air tips.
1 blacksmith's anvil and forge.
1 blacksmith's sledge hammer.
381 retort coolers.
150 feet overhead track complete with travelers and tackle.
3 testing tanks.

All tissue paper, solder, bar copper, acid, salt and tin plate now upon the above described premises, or thereafter during the life of this mortgage to be brought upon said premises by the said defendant The Pacific Northwest Packing Company, and all cans now upon the said premises, or hereafter to be brought or manufactured there, all fish hereafter bought or caught by said The Pacific Northwest Packing Company both before and after packing.

All shafting, belting, pulleys, piping and all other personal property, of every kind and character, situated in or about any of the above-described premises.

That in said indenture of mortgage it was particularly recited and agreed that the above and foregoing more particular description of personal property contained in said indenture of mortgage was not intended to limit the lien of the said mortgage to said property only, but that it was the intention of the said defendant that all other personal property which might not be particularly described in said indenture of mortgage, but which was or should be used in connection with or in the enjoyment of the cannery plant of the said defendant, was intended to be covered by the said indenture of mortgage, in like manner as though it were also particularly described therein.

That in said indenture of mortgage it was further covenanted and agreed that your orator should have and hold all and singular the said property, and every part and parcel thereof, together with all and singular the tenements, hereditaments, and appurtenances thereunto

belonging, or in anywise appertaining, and also all the rents, issues, and profits arising therefrom, and all the easements, franchises, and privileges connected therewith or appertaining thereto, unto your orator, and unto his heirs, executors, administrators, or assigns, to his and their own benefit and behoof forever.

That in said indenture of mortgage it was particularly recited that the same was intended as a mortgage, to secure the payment of the sum of $25,734, with interest thereon at the rate of ten per cent per annum from the 11th day of May, A. D. 1900, the same being the loan evidenced by the promissory note in this paragraph first above referred to, and as a mortgage to secure the further sum of $6,687.50, with interest thereon from the 15th day of May, 1900, being the loan to be made, as hereinabove recited, and evidenced by the promissory note in this paragraph secondly hereinabove described.

That in said indenture of mortgage it was further particularly recited that the same was further intended as a mortgage to secure any advances which your orator might make to the defendant other than the advance of $6,687.50 above specified, between the 11th day of May, 1900, and the 15th day of July, 1900, with interest thereon from the date of any such advancement until paid, at the rate of ten per cent per annum, such additional advances, however, not to exceed in all the sum of $10,000.

That in said indenture of mortgage it was further provided that if the said defendant The Pacific Northwest Packing Company should well and truly pay the

said notes, and all principal and interest thereon, at their maturity, and any such further advances as your orator might make, as specified in said mortgage, and within the limitations therein specified, with interest thereon as provided in said indenture, and should meanwhile promptly pay all taxes which should be levied or assessed upon the property above described, and should keep the buildings, structures, and fixtures, and all improvements thereon, and all of the property above described, or used in connection therewith, insured in responsible insurance companies to be approved by your orator, in a sum not less than $45,000, loss, if any, payable to your orator, and should promptly pay all premiums which might be required to keep said property so insured; and should pay and discharge promptly all expenses of taking care of and of operating and of keeping in good order and repair all of the property described in said mortgage, or intended so to be, and should observe and perform all of the things in said indenture provided to be observed and performed on its part, then said indenture should be void; but otherwise, and until all of such payments should be fully paid, the said indenture should stand as a mortgage for the full payment of the principal and interest of all of said indebtedness, and of the premiums to effect and continue in force the insurance on the property mortgaged, or intended so to be, and the taxes thereon, and all assessments thereon, and of all reasonable costs and expenses which might be incurred in caring for said property, and in keeping the same in repair.

And it was further provided in said indenture that if the defendant should fail to promptly pay the taxes and assessments which might be assessed or levied upon said property, or upon any part thereof, or should fail or neglect, at any time, to pay the premiums required for keeping the same insured, as in said indenture specified, or should fail or neglect to pay the said indebtedness, or to pay any installment of interest thereon, or in case your orator should, at any time, consider his security for said indebtedness insufficient, or his debt insecure, then and in any of said events it should be lawful for your orator, and the said defendant The Pacific Northwest Packing Company did in said indenture expressly authorize and empower your orator in such event to immediately foreclose the said mortgage, and to cause the whole or any part of said property to be sold, or so much thereof to be sold as might be necessary to pay the costs and expenses of such sale, and of such foreclosure, the taxes and assessments upon said property, the insurance premiums, and the indebtedness in said indenture provided for and remaining unpaid at the time of foreclosure and sale, and also a reasonable fee for the attorneys or counsel representing your orator in the suit or action which he should prosecute to foreclose said mortgage, rendering the surplus, if any there should be, whether of property or of money, to the said defendant, its successors or assigns.

That in the said indenture of mortgage it was further provided that any sums which your orator might advance or pay for discharging any taxes assessed or levied

upon any of the said mortgaged property, or any part thereof, or by way of premiums to keep said property insured, should be secured by the said mortgage, and should draw interest from the dates of payment at the rate of ten per cent per annum.

That in said indenture of mortgage it was further provided that should your orator for any reason find it necessary to institute a suit or action to foreclose the said mortgage, there should be appointed at the option of your orator a receiver to take charge of and to take possession of all of the mortgaged property, and to care for and keep the same in repair, and to operate the packing plant now thereon, if in the judgment of your orator or of the Court having jurisdiction of such suit it should be advantageous, necessary, or expedient so to do, and that the costs, charges, fees, expenses, compensation and disbursements of such receiver should be a charge and lien on the said mortgaged property, and the payment of the same, and the whole thereof, should be secured in like manner as the mortgage debt, and that in addition thereto, and in addition to the mortgage debt and the sums which should have been paid by your orator, in such suit, your orator, in addition to the costs, expenses and disbursements of such suit, should be entitled to recover a reasonable sum for the compensation of the attorneys, solicitors or counsel representing him in such suit, the same to be fixed by the Court, and that such sum should be taxed as part of the costs and disbursements, and be made a lien upon the mortgaged property in any judgment which should be recovered in such suit or action,

and that the said indenture of mortgage should be held as security for the payment of the same.

That in said indenture of mortgage it was further provided that in case the proceeds of the property thereby mortgaged, or intended so to be, should be insufficient to pay and discharge all of the sums secured thereby, then the said defendant The Pacific Northwest Packing Company should, and it did in said indenture expressly covenant and agree, to immediately pay to your orator the residue of such indebtedness so remaining unpaid; and for such purpose, and with such object in view, and in order to more fully protect your orator in the premises, the said defendant did expressly agree to waive, and did waive, all provisions in its favor contained in section 5888a of the laws of the State of Washington, as compiled and annotated by the Honorable R. A. Ballinger.

That the said indenture of mortgage was signed by The Pacific Northwest Packing Company, by Wm. C. McKee, its president, and that the corporate seal of the said defendant was imprinted upon the said indenture of mortgage, and the execution of the said mortgage and the sealing thereof was duly attested by Harwood Morgan, secretary of the said defendant, all in the presence of two witnesses, who subscribed their names as witnesses to the execution thereof to the said mortgage.

That United States internal revenue documentary stamps, duly canceled in the manner prescribed by law, and to the full amount required by law, were attached to the said indenture of mortgage.

That the execution of the said mortgage was duly and legally acknowledged by the president and secretary of the said defendant before a notary public in and for the State of Washington, duly commissioned and sworn, in all respects in accordance with the requirements of the laws of the State of Washington for the acknowledgment of mortgages upon real property, and the said acknowledgment was duly certified to in writing upon the said indenture of mortgage by the said notary public, and his certification thereof was attested by the notarial seal of the said notary upon the said indenture of mortgage.

That at the time of and as a part of the execution of the said mortgage, the said president and secretary of the said defendant duly took and subscribed an oath, before a notary public in and for the State of Washington, to the effect that the said indenture of mortgage was made in good faith and for an actual, existing indebtedness, and was made without any design to hinder, delay, or defraud any creditor or creditors, which oath was duly attested by the notary public before whom the same was taken, over his signature and notarial seal.

That thereafter, and on the 14th day of May, 1900, the said indenture of mortgage was duly filed for record in the office of the auditor of Whatcom county, and was there recorded in the manner prescribed by law at page 248, of volume 31, of the Records of Real Estate Mortgages of said county, and at page 448 of volume G of the Chattel Mortgage Records of said county.

VII.

That after the execution and delivery of the last hereinabove described mortgage, made by The Pacific Northwest Packing Company to your orator, your orator, at the special instance and request of the said defendant The Pacific Northwest Packing Company, on, to wit, the 12th day of May, 1900, loaned to the said defendant the sum of $5,475, as a part of the advances provided for in said mortgage; and on the said day, the said defendant acting through its president and secretary, who were thereunto duly authorized, empowered and directed, by a resolution of the board of trustees of the said defendant, duly made, executed and delivered to your orator the promissory note of the said defendant, dated Seattle, Washington, May 12th, 1900, wherein and whereby the said defendant promised and agreed to pay, to the order of your orator, on demand after date, with interest thereon at the rate of ten per cent per annum from date until paid, the sum of $5,475. That to the said promissory note were attached United States documentary revenue stamps, duly canceled in the manner prescribed by law, for the full amount required by law.

That thereafter, to wit, on the 1st day of June, 1900, your orator, at the special instance and request of the said defendant The Pacific Northwest Packing Company, loaned to said defendant the sum of $3,000, as a part of the advances provided for in said mortgage; and on the said day the said defendant, acting through its president and secretary, who were thereunto duly authorized, empowered, and directed, by a resolution of the board of

trustees of the said defendant, duly made, executed and delivered to your orator the promissory note of the said defendant, dated Seattle, Washington, June 1st, 1900, wherein and whereby the said defendant promised and agreed to pay, to the order of your orator, on demand after date, with interest thereon at the rate of ten per cent per annum from date until paid, the sum of $3,000. That to the said promissory note were attached United States documentary revenue stamps, duly canceled in the manner prescribed by law, for the full amount required by law.

That thereafter, to wit, on the 12th day of June, 1900, your orator, at the special instance and request of the said defendant The Pacific Northwest Packing Company, loaned to said defendant the sum of $1,799.16, as a part of the advances provided for in said mortgage; and on the said day, the said defendant, acting though its president and secretary who were thereunto duly authorized, empowered and directed, by a resolution of the board of trustees of the said defendant, duly made, executed and delivered to your orator the promissory note of the said defendant, dated Seattle, Washington, June 12th, 1900, wherein and whereby the said defendant promised and agreed to pay, to the order of your orator, on demand after date, the sum of $1,799.16, with interest thereon at the rate of ten per cent per annum from date until paid. That to the said promissory note were attached United States documentary revenue stamps, duly canceled in the manner prescribed by law, for the full amount required by law.

VIIIa.

That on, to wit, the 11th day of May, 1900, the defendant The Pacific Northwest Packing Company, as further and additional security to your orator for the payment of all of the indebtedness mentioned and described and contemplated in the indenture of mortgage made by the said defendant to your orator on the 11th day of May, 1900, caused to be transferred and assigned to Austin Claiborne, as trustee for your orator and the said defendant, those certain fishing rights or licenses evidenced by State Fishing Licenses Nos. 208 and 127, and issued by the Fish Commissioner of the State of Washington to Harwood Morgan and E. G. J. McDonald, respectively. That the terms of the trust upon which said licenses were transferred and assigned to the said defendant Austin Claiborne, were that the same, and all rights and privileges thereon or arising thereunder, should be held by the said Austin Claiborne, as trustee, until all of the indebtedness mentioned and described in the said mortgage should have been paid to your orator, and when said indebtedness had been so paid, should be retransferred and assigned to the said Harwood Morgan and the said E. G. J. McDonald. That the said defendant Austin Claiborne still holds the said licenses under said assignment and said trust.

VIIIb.

That on, to wit, the 14th day of August, 1900, the defendant The Pacific Northwest Packing Company, for the purpose of securing unto your orator the payment of all indebtedness, of every kind, nature and description then

due and owing, or thereafter to become due and owing, and for the purpose of securing all loans and advances which might after said date be made by your orator to the said defendant, caused to be transferred and assigned, in trust, to L. C. Gilman, those certain fishing licenses evidenced by certificates Nos. 1896, 1840 and 1816; and upon the same day, and for the same purpose, caused to be assigned to W. M. Williams that certain fishing privilege or license, evidenced by certificate No. 2252.

That the terms of said trust were as follows: An undivided one-half of the said fishing license should be held in trust by the said trustees, as security for the payment to your orator of all indebtedness then due or to become due from said defendant The Pacific Northwest Packing Company, and for the payment of all loans or advances which might, after said date, be made by your orator to the said defendant, and the said undivided one-half of said licenses to be, upon the payment of said indebtedness, or sooner, if directed by your orator, conveyed to the said defendant The Pacific Northwest Packing Company; the other one-half of the said fishing licenses to be held in trust for one L. H. Griffin, the owner thereof.

That thereafter, and on, to wit, the 7th day of August, 1900, the said L. C. Gilman obtained from the Fish Commissioner of the State of Washington renewals of the said fishing licenses Nos. 1816 and 1840, and procured from the said Commissioner new licenses in lieu thereof, license No. 1839 being issued for the original license No. 1816, and license No. 1838 being issued for original

license No. 1840. That the said new licenses so obtained by the said L. C. Gilman were obtained and held by him upon the same trusts as the said original licenses had been received and held by him, until, to wit, the 30th day of August, 1900, when the said Gilman, with the knowledge and consent of all of the persons interested in said fishing licenses and said trust transferred the said new licenses Nos. 1838 and 1839, and the above-described license No. 1896, upon the same trust as above mentioned, to the defendant W. A. Keene. That the said defendant W. A. Keene accepted the said transfers and assignment of the said licenses and the trust imposed thereon, and now holds the said licenses upon the same trusts as originally created by the assignment to the said L. C. Gilman.

IX.

That the said defendant The Pacific Northwest Packing Company has failed and refused to pay taxes levied upon the property described in the mortgage dated May 11, 1900, amounting to the sum of $385.67, and in order to prevent the seizure of the said mortgaged property, your orator has been obliged to pay, and did pay on the 20th day of August, 1900, the said taxes, amounting to the sum of $385.67, and hereby claims the same to be secured by said mortgage.

That the said defendant has failed and refused to pay the necessary premiums to procure and keep in force insurance upon the said property, as specified and agreed in said mortgage, and your orator has been obliged to pay and has paid premiums upon such insurance aggre-

gating the sum of $1,245.45, and hereby claims the same, with interest thereon, from the respective dates of payment, to be secured by said mortgage.

X.

That no part of the indebtedness mentioned and described in the three indentures of mortgage hereinabove described, made by the defendant The Pacific Northwest Packing Company, to your orator, of date October 20th, 1898, and May 11th, 1900, or mentioned and described in any of the promissory notes hereinabove described, made on and subsequent to the 11th day of May, has been paid, although your orator has frequently demanded payment thereof.

That no part of the taxes or insurance premiums paid by your orator has been paid by said defendant The Pacific Northwest Packing Company, although the payment thereof has been frequently demanded.

That your orator considers his security for the payment of the indebtedness mentioned and described in the three hereinabove mentioned mortgages to be insufficient, and considers that all of the indebtedness secured by the said mortgages is insecure, and by reason of the failure of the said defendant to pay the said indebtedness, or to pay the said taxes or insurance premiums, or any part thereof, and by reason of the insufficiency of the security given to your orator by the said defendant, and by reason of the insecurity of the indebtedness secured by the said mortgages, your orator has elected, and does hereby elect, to foreclose the said mortgages.

above mentioned and described, and of all of the rights and privileges to which your orator is or may be entitled under and by virtue of the assignments of the fishing licenses hereinabove described, and of all the fishing nets and traps, and fishing sites and locations which are or may be held and operated under the said fishing licenses, and all of them, and will by its order place said receiver in possession of all of the said property, and in the enjoyment of all of the said fishing rights and licenses, and in the possession of all fishing sites and locations which are or may be held and operated under the said licenses, or any of them, and will, from time to time, make such orders in reference thereto as will fully protect your orator in all the rights secured to him by the said mortgages, and by the said assignments of said fishing licenses, and that by the order of his appointment the said receiver be permitted to continue the business now carried on by the said defendant The Pacific Northwest Packing Company, in such manner as will be for the best interests of all persons interested therein, and in the success thereof.

Second.

That upon the trial of this action this Court will determine the amount due to your orator from the defendant The Pacific Northwest Packing Company, and that your orator shall then have judgment against the said defendant for the amount so found to be due, and for the additional sum of five thousand dollars as an attorney's fee in this action.

Third.

That upon the trial of this action this Court will ascertain and declare what portion of the indebtedness found to be due from the defendant The Pacific Northwest Packing Company to your orator is secured by the mortgages and assignments hereinabove described, and that this Court will thereupon, by its decree, establish the said mortgages as valid, first, and prior liens upon all of the property therein described, and said assignments as valid assignments of the said fishing licenses, and will direct a sale of all of such property, in accordance with law and the practice of this Court, and that the proceeds of said sale or sales be applied to the payment of the amounts found to be due and secured by the said mortgages and said assignments, with all costs and interest thereon, and such reasonable compensation as this Court shall fix for the solicitors and attorneys of your orator employed for the foreclosure of said mortgages.

Fourth.

That upon the making of such sale or sales the defendants, and each of them, and all persons claiming by, through or under them, or either of them, may be forever barred and foreclosed of all right or equity of redemption of, in, or to the said property, excepting only such right or equity of redemption as is provided by the laws of the State of Washington.

Fifth.

That your orator may have such other and further and general relief as may seem to your Honors just and equitable.

Sixth.

May it please your Honors to grant unto your orator a writ of subpoena, issuing out of and under the seal of this Honorable Court, and directed to the said defendants above named, and each of them, commanding the said defendants, and each of them, on a day certain to be therein named, and under a certain penalty therein to be prescribed, to be and appear before this Honorable Court, then and there to answer all and singular the premises (but not under oath, an answer under oath being expressly waived), and to stand and perform and abide by such order, direction, and decree as may be made against them, or either of them, in the premises, as shall seem meet and agreeable to equity.

And your orator will ever pray.

Dated at Seattle, King county, State of Washington, this 8th day of September, 1900.

HENRY F. ALLEN.

PRESTON, CARR & GILMAN,
Solicitors for Complainant.

E. M. CARR,
Of Counsel.

United States of America,
District of Washington. } ss.

Henry F. Allen, being first duly sworn, on oath deposes and says that he is one of the solicitors for the complainant in the above-entitled action; that he makes this verification for and on behalf of the complainant, because complainant is now without, and is a nonresident of, said District of Washington; that he has heard

the foregoing bill of complaint read, knows the contents thereof, and believes the same to be true.

HENRY F. ALLEN.

Subscribed and sworn to before me this 8th day of September, 1900.

[Seal] R. M. HOPKINS,

Deputy Clerk United States Circuit Court, District of Washington.

[Endorsed]: Bill of Complaint. Filed this 8th day of September, 1900. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, for the Northern Division of the District of Washington.

IN EQUITY.

HENRY F. ALLEN,
Complainant,
vs.
PACIFIC NORTHWEST PACKING COMPANY (a Corporation), and THE PACIFIC NORTHWEST PACKING COMPANY (a Corporation),
Defendants.
No. 872.

Order Appointing Receiver.

Upon reading and filing the bill of complaint of the complainant herein, Henry F. Allen, and the motion of

the said complainant for the appointment of a receiver herein; and it appearing to the Court that good and sufficient grounds exist for the appointment of a receiver herein, without notice, and that John H. McGraw, is a suitable person to be appointed such receiver:

It is here and now ordered that John H. McGraw be, and he is hereby, appointed receiver herein.

It is further ordered that the said John H. McGraw, receiver, before entering upon the discharge of his duties as such receiver, make, execute, and deliver to the clerk of this Court his bond in the sum of $5,000, with a surety or sureties to be approved by the clerk or deputy clerk of this Court, conditioned for the faithful discharge of his duties as receiver, and for his obedience to all orders made upon him by this Court, and that he take and subscribe an oath as such receiver in the usual form.

It is further ordered that upon the execution, approval and filing of the bond above required, and upon the filing of the oath of office above required, the said receiver forthwith take into his possession all of the mortgaged property described in the bill of complaint herein, wherever and in whosesoever possession the same may be found; and that the said receiver, until the further orders of this Court, conduct and carry on the business of catching, buying, butchering, canning, shipping and selling salmon now being carried on by the defendant The Pacific Northwest Packing Company, in such manner as shall be to the best interests of all persons therein concerned and as shall be directed by this Court.

Dated at Seattle, in the District of Washington, this 8th day of September, 1900.

C. H. HANFORD,
Judge.

[Endorsed]: Order Appointing Receiver. Filed this 8th day of September, 1900. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

HENRY F. ALLEN,
Complainant,
vs.
PACIFIC NORTHWEST PACKING COMPANY (a Corporation), and THE PACIFIC NORTHWEST PACKING COMPANY (a Corporation) et al.,
Defendants.
No. 872.

Order of Court Containing Receiver, etc.

This cause came on for hearing, in open court, on the 15th day of October, 1900, upon the motion of the defendant The Pacific Northwest Packing Company for an order directing the discharge of John H. McGraw, theretofore appointed receiver of the property described in the complainant's bill of complaint herein, and also upon the application of the complainant for an order upon the

said defendant requiring it to show cause, if cause it had, before this Court, at a time to be fixed by an order of this Court, why the order made herein on the 8th day of September, 1900, appointing John H. McGraw receiver of the mortgaged property described in the complainant's bill of complaint herein should not be in all respects confirmed, and the appointment of said John H. McGraw as receiver of the said mortgaged property continued. The complainant appeared by his solicitors Messrs. Preston, Carr & Gilman, and the defendant The Pacific Northwest Packing Company appeared specially for the purpose of contesting said motions only by its solicitor, W. M. Allison, Esq., and its counsel, Messrs. Bausman, Kelleher & Emory.

Upon the application of the complainant, it was by the Court ordered, with the express consent of the defendant given in open court, that the defendant The Pacific Northwest Packing Company be and appear in this court, at the hour of two o'clock P. M. of Tuesday, the 16th day of October, A. D. 1900, and then and there show cause, if any cause it had, why the order above referred to, appointing John H. McGraw receiver of the mortgaged properties described in the complainant's bill of complaint herein, should not be in all respects confirmed, and the appointment of said John H. McGraw, as receiver of the mortgaged property described in the complainant's bill herein be continued. It was further ordered, upon the consent of the parties hereto, that the hearing of the defendant's motion for the discharge of the said receiver be continued until the same hour, to wit,

two o'clock P. M. of Tuesday, October 16th, 1900; and it was further ordered, by consent of the parties hereto, that said motion of the defendant, and the said order to show cause and the return thereto, should be heard together. The said motion and the said order to show cause came on for hearing in open court on the 16th day of October, 1900, at the hour of two o'clock P. M., complainant appearing by its solicitors, Messrs. Preston, Carr & Gilman, and the defendant appearing by its solicitors, W. B. Allison, Esq., and its counsel, Messrs. Bausman, Kelleher & Emory. The hearing proceeded, and not being finished at the Court's usual hour of adjournment, the further hearing of the said motion and said order to show cause and return thereon were continued until Thursday, the 18th day of October, 1900, at the hour of ten o'clock A. M. of said day, at which hour the parties appeared by their solicitors and counsel, as before specified, and the hearing of the said motion and of the said order to show cause was finished and was by the Court taken under advisement.

And the Court having read and fully considered all of the affidavits filed herein by the complainant and the defendant in connection with and upon the hearing of the said motion and the said order to show cause, and the files and records of said cause including the receiver's report filed herein October 15, 1900, and being fully advised as to all the facts, and having heard and considered the argument of counsel and being fully advised as to the law, does now find:

1st. That the complainant's bill of complaint herein discloses, and did at the time of its filing disclose, facts requiring the appointment of a receiver of the mortgaged property herein by this Court to be made, in order that the rights of the complainant herein should be protected and preserved.

2d. That upon the application of the complainant for the appointment of a receiver of the mortgaged property herein, sufficient facts existed and were shown to the Court to excuse the giving of notice to the defendant of the time and place of the making of said application, and sufficient facts existed and were shown to the Court to justify the Court to then appoint a receiver of the mortgaged property herein without notice to the defendant.

3d. That within an hour after the appointment of the receiver herein on the 8th day of September, A. D. 1900, the defendant, through its managing officer, Harwood Morgan, the secretary of the said company, had full notice and knowledge of the appointment of the said receiver and of the terms of his appointment, and within twenty-four hours after the said appointment, Wm. C. McKee, the president, and E. G. J. McDonald, the vice-president of the said company, had full notice and knowledge of the appointment of the said receiver, and of the terms of his appointment; that the said Morgan, McKee and McDonald are, and at all times have been, stockholders and officers of the defendant; that from the day following the appointment of the said receiver, and until a short time before the hearing of the said motion and the said order to show cause, the said McKee, presi-

dent of the defendant, was in the employ of the receiver, assisting him in the business of his receivership at an agreed salary of seventy-five dollars per month, and the said McDonald, during all of said time, voluntarily rendered services to the said receiver in the conduct of the said receiver's business, without compensation; that during all of said time, the said Morgan, secretary of the defendant, and the said McKee president of the said company, were in frequent conferences with the solicitors of the complainant regarding the progress of negotiations which were pending for a settlement of the difficulties in which the defendant had become involved; that after the appointment of the said receiver, and prior to the filing of the defendant's motion for the discharge of the said receiver, the complainant, at the special request of the officers of the defendant, advanced sums of money aggregating the sum of $7,071.26, to John H. McGraw, the receiver herein, to be paid out and which were paid out by the said receiver for the protection and preservation of the property of the defendant covered by the mortgages to the complainant described in his bill of complaint herein.

4th. That the defendant has wholly failed to show any cause why the receiver herein should be removed, and has wholly failed to show any prejudice or damage which has resulted to it by the failure of the complainant to give notice of its application for the appointment of a receiver herein.

5th. That the defendant, in an action pending in the Superior Court of the State of Washington, for the

County of King, in which F. W. Coler is plaintiff, and the said defendant is defendant, has, since the commencement of this action, in legal effect, confessed its insolvency and consented to the appointment of a receiver of all of its property.

6th. That owing to the unexpected and wholly unparalleled failure of the usual run of salmon in the vicinity of the defendants' cannery during the past salmon season, the defendant has been, since the first day of July, 1900, wholly without pecuniary means with which to carry on its business and preserve and protect its property, excepting the moneys which have been advanced to it by the complainant, as shown by his bill of complaint herein, in the expectation that said salmon run was only delayed, and except such moneys as the complainant has advanced to the receiver, as shown by the affidavits on file herein.

7th. That good and sufficient grounds exist for the confirmation of the order heretofore, on the 8th day of September, 1900, made herein, appointing John H. McGraw receiver of all of the mortgaged property described in the plaintiff's bill of complaint herein, and continuing said John H. McGraw as receiver of the said defendant.

Wherefore, by reason of the law and the facts, it is here and now by the Court ordered that the order of this Court heretofore made and entered herein on the 8th day of September, 1900, appointing John H. McGraw receiver of all of the mortgaged property mentioned and described and referred to in the complainant's bill of

complaint herein, be and the same is in all respects ratified and confirmed, and that the said John H. McGraw be, and he is hereby, continued as receiver of all of the said mortgaged property under his said original order of appointment and this order of confirmation, until the further order of this Court, and the motion of said defendant The Pacific Northwest Packing Company to vacate and set aside said order of Sept. 8, 1900, appointing said receiver be, and the same is hereby, denied, and exception is allowed said defendant.

Done in open court, this 25th day of October, 1900.

C. H. HANFORD,

Judge.

[Endorsed]: Order of Court. Filed this October 25, 1900. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

HENRY F. ALLEN,
Complainant,
vs.
PACIFIC NORTHWEST PACKING COMPANY (a Corporation), THE PACIFIC NORTHWEST PACKING COMPANY (a Corporation), AUSTIN CLAIBORNE, W. M. WILLIAMS, and W. A. KEENE,
Defendants.
No. 872.

Rule Taking Bill Pro Confesso as to Certain Defendants.

It appearing to the Court that the subpoena issued in this cause was duly and regularly served upon Austin Claiborne, one of the defendants herein, on the 13th day of September, 1900, by delivering to and leaving with said Austin Claiborne, at Seattle, Washington, within said District, an attested copy of said subpoena; and that said subpoena was duly and regularly served upon said W. M. Williams and W. A. Keene, two of the defendants above named, on the 10th day of September, 1900, by delivering to and leaving with said W. M. Will-

iams and said W. A. Keene, and each of them, at Seattle, within said District, an attested copy of said subpoena; and it further appearing to the Court that while the said service was not made on either of the said defendants more than twenty days prior to the return day named in the said subpoena, it was served upon the said defendants W. M. Williams, W. A. Keene and Austin Claiborne more than twenty days prior to the November return day of this court; and it further appearing that said defendants, and each of them, have not appeared in this suit, either in person or by solicitor, and that none of said defendants named have appeared in this suit at all:

Now, therefore, on motion of Preston, Carr & Gilman, solicitors for complainant, it is ordered that the bill of complaint in said cause be taken pro confesso as to said defendants named in accordance with the rules in such cases made and provided.

Done in open court, this 22d day of December, 1900.

C. H. HANFORD,
Judge.

[Endorsed]: Rule Taking Bill Pro Confesso as to Certain Defendants. Filed in the United States Circuit Court, District of Washington. December 22, 1900. A. Reeves Ayres, Clerk. A. N. Moore, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

IN EQUITY.

HENRY F. ALLEN,
Complainant,
vs.
PACIFIC NORTHWEST PACKING COMPANY (a Corporation), THE PACIFIC NORTHWEST PACKING COMPANY (a Corporation), AUSTIN CLAIBORNE, W. M. WILLIAMS, and W. A. KEENE,
Defendants.

Order Allowing F. W. Coler to Intervene.

The motion of F. W. Coler, a judgment creditor of the defendant The Pacific Northwest Packing Company, being heard, it is

Ordered that said F. W. Coler, be and he hereby is, allowed to file his complaint in intervention in this cause and serve copies thereof upon the complainant and each of the defendants, and that the complainant and the defendants be, and they are hereby, required to answer the same according to the rules pertaining to bills of complaint.

Dated December 29th, 1900.

C. H. HANFORD,
Judge.

[Endorsed]: Order Allowing Intervention of F. W. Coler. Filed in the United States Circuit Court, District of Washington. December 31, 1900. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

IN EQUITY.

HENRY F. ALLEN,
Complainant,
vs.
PACIFIC NORTHWEST PACKING COMPANY (a Corporation), THE PACIFIC NORTHWEST PACKING COMPANY (a Corporation), AUSTIN CLAIBORNE, W. M. WILLIAMS, and W. A. KEENE,
Defendants.

Motion for Leave to Intervene.

F. W. Coler, a judgment creditor of the defendant The Pacific Northwest Packing Company, respectfully moves the Court for an order allowing him to intervene in this cause on the annexed complaint in intervention.

BAUSMAN, KELLEHER & EMORY,
Solicitors for F. W. Coler.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

IN EQUITY.

HENRY F. ALLEN,
Complainant,

vs.

PACIFIC NORTHWEST PACKING COMPANY (a Corporation), THE PACIFIC NORTHWEST PACKING COMPANY (a Corporation), AUSTIN CLAIBORNE, W. M. WILLIAMS, and W. A. KEENE,
Defendants.

Complaint in Intervention.

To the Honorable, the Judges of the Circuit Court of the United States for the District of Washington:

Your orator, who is a citizen, resident and inhabitant of the State of Washington, brings this his complaint in intervention against the complainant and defendants above named, and each of them, on behalf of himself and of such other creditors of defendant The Pacific Northwest Packing Company as may come into this cause and contribute to its expenses, and thereupon your orator complains and says:

I.

I admit each and every averment contained in paragraphs I, Ia, and II of the complainant's bill of complaint.

II.

As to paragraph III of complainant's bill of complaint I admit each and every averment therein, except that I deny that The Pacific Northwest Packing Company is now carrying on the business formerly carried on by the defendant Pacific Northwest Packing Company; and as to whether The Pacific Northwest Packing Company has in any way assumed and obligated itself to pay all the indebtedness of every kind, nature, and description of the Pacific Northwest Packing Company, I have no knowledge or information concerning either or all these averments.

III.

As to the averments contained in paragraph IV of complainant's bill of complaint, I have no knowledge or information concerning either or all of them, except that I admit that on the 20th day of October, 1898, defendant Pacific Northwest Packing Company did execute a certain mortgage to complainant Allen on the property described in that paragraph and containing the terms therein described, and I admit that this mortgage was recorded as averred in that paragraph.

IV.

As to paragraph V of complainant's bill of complaint, I admit that defendant Pacific Northwest Packing Com-

pany did execute the mortgage on the "Albert Lee" and that that mortgage was recorded as averred in that paragraph.

V.

As to paragraph VI of complainant's bill of complaint, I admit that defendant The Pacific Northwest Packing Company executed a mortgage on the property in that paragraph described and that it contained generally the terms in that paragraph described, and that it was recorded at the times and places in that paragraph described, but I have no knowledge or information concerning either or all the remaining averments of that paragraph and particularly as to whether, as in that paragraph averred, the sum of $25,734.00, or any part thereof, was a full and just sum to be so secured by mortgage and due from defendant The Pacific Northwest Packing Company to complainant Allen; and I deny each and every averment therein to the effect that such mortgage is or was in any respect valid, and I have no knowledge or information concerning the averments that any advances of any kind had been or were to be made under that mortgage, or that any note purporting to be secured by that mortgage were or had been executed to the complainant or ought to have been executed to the complainant, or that any or all such notes were in any respect valid.

VI.

As to paragraph VII of complainant's bill of complaint I have no knowledge or information as to any of the averments in that paragraph set out.

VII.

As to paragraphs VIIIa, VIIIb, IX, X, XI and XII, I have no knowledge or information concerning any or all the averments in either of those paragraphs set out.

VIII.

As to paragraph XIII of complainant's bill of complaint, I deny that five thousand dollars is a reasonable attorney's fee in this suit for complainant's counsel, or that anything more than twenty-five hundred dollars is a reasonable attorney's fee.

And this intervenor, waiving none of his denials or defenses as hereinbefore set forth and praying to have the benefit of the same as if herein specially pleaded, further complaining says:

I.

Your orator is a citizen, resident, and inhabitant of the State of Washington; complainant Allen is and at all the times hereinafter mentioned was a citizen, resident, and inhabitant of the State of California; defendants Pacific Northwest Packing Company, and The Pacific Northwest Packing Company, and each of them, are now and were at all the times hereinafter mentioned corporations organized and existing under the laws of the State of Washington, with the principal place of business of each at Seattle, King County, Washington; that the defendants, Austin Claiborne, W. M. Williams, and W. A. Keene, and each of them, are now and were at all the times hereinafter mentioned residents, citizens, and inhabitants of the State of Washington.

II.

The Seattle National Bank at all the times herein mentioned was and now is a corporation organized and existing under the laws of the United States relating to the creation of national banks and is a resident, citizen, and inhabitant of the State of Washington, and was at all the times herein mentioned.

III.

On the 17th day of February, 1900, defendant Pacific Northwest Packing Company, in consideration of one thousand dollars to it loaned by The Seattle National Bank aforesaid, made, executed, and delivered to that bank its certain promissory note in that amount, bearing that date, and on demand, which note was duly stamped with United States revenue stamps as required by law. Thereafter the defendant The Pacific Northwest Packing Company assumed and agreed to pay this note; and thereafter The Seattle National Bank endorsed, transferred, and delivered it to your orator, F. W. Coler.

IV.

Your orator subsequently brought suit upon this note in the Superior Court of King County, State of Washington, and such proceedings were had in that suit, that on the 19th day of December, 1900; judgment was rendered in your orator's favor and against the present defendant The Pacific Northwest Packing Company, in the sum of ten hundred and eighty-five dollars. No part of this judgment has ever been paid and your orator is now the owner and holder thereof.

V.

Your orator further complaining says, that on the —— day of September, 1900, upon the filing of the bill of complaint by complainant Allen in this cause, a receiver, John H. McGraw, was appointed of all the assets covered by the alleged mortgage of the complainant, and that the said McGraw is now in the full possession of those assets under the orders of this court. That these assets are all of the property of either or both the defendant packing companies, and that by reason of such possession by the receiver McGraw this intervenor complainant has no means of realizing upon his indebtedness and any execution issued by him would be idle, frivolous, and nugatory, and that except as your orator shall find relief in this cause there is no property whatsoever of the defendant The Pacific Northwest Packing Company from which anything can be realized upon the judgment above set forth.

VI.

Your orator further complaining say, that the defendants Pacific Northwest Packing Company and The Pacific Northwest Packing Company are, each and both of them, wholly insolvent; that the liabilities of each grossly exceed the assets of each; that each of them was insolvent at all times in the month of May, 1900, and at the time of the giving of the mortgage to complainant Allen as set out in paragraph VI of complainant's bill of complaint. That at the time of giving this mortgage the defendant The Pacific Northwest Packing Company had reached a point where its debts were greater than its property,

where it could not pay in the ordinary course, where its business was no longer profitable, and when it ought to be wound up and its assets distributed. The mortgage referred to in paragraph VI of complainant's bill of complaint was and is an unlawful preference, under the laws of the State of Washington, and such as could not be given lawfully by a debtor in the then financial condition of defendant The Pacific Northwest Packing Company.

VII.

Your orator, further complaining, says that he is, as a judgment creditor of defendant The Pacific Northwest Packing Company, entitled to share equally and ratably with complainant Allen, and any other creditor who may come into this action, in the assets of defendant The Pacific Northwest Packing Company, free and clear of the mortgage set out in paragraph VI of complainant's bill of complaint, and that that mortgage is as to him, and as to such other creditors as may come in, illegal and void.

(1) Forasmuch as your orator, this intervenor, can have no adequate relief, except in this court, and to that end, therefore, that the complainant Allen and the above defendants may, if they can, show why your orator should not have the relief hereby prayed and make a full disclosure and discovery of all of the matters aforesaid, and according to the best and utmost of their knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to the matters hereinbefore stated and charged, but not under oath, an answer under oath being hereby expressly waived.

(2) That the mortgage of defendant The Pacific Northwest Packing Company set out in paragraph VI of the bill of complaint of complainant Allen herein be declared, as to your orator, the intervenor, and as to such other creditors as may come into this cause, null and void.

(3) That the assets of the defendant The Pacific Northwest Packing Company be declared a trust fund for the creditors of that defendant and be distributed among them equally and ratably.

(4) That complainant Allen be prohibited and enjoined from in any way collecting, foreclosing, or proceeding upon the mortgage referred to.

(5) That your orator may have such other and further relief as to the Court may seem meet and just in the premises.

(6) May it please your Honor to grant unto your orator not only the relief hereinabove prayed for, but also a writ of subpoena to the complainant Allen and to the above-named defendants herein, commanding them, and each of them, on a day certain to appear and answer unto this complaint in intervention and to abide and perform such order and decree in the premises as to the Court shall seem proper and required by the principles of equity and good conscience.

BAUSMAN, KELLEHER & EMORY,
Solicitors for Intervenor F. W. Coler.

State of Washington, }
County of King. } ss.

F. W. Coler, being first duly sworn, on oath says that he is the intervenor named in the foregoing complaint in intervention; that he has read the same, knows the contents thereof and believes the same to be true.

F. W. COLER.

Subscribed and sworn to before me this 29th day of December, 1900.

[Notarial Seal] DANIEL KELLEHER,
Notary Public in and for the State of Washington, Residing at Seattle, Wash.

[Endorsed]: Complaint in Intervention. Filed in the United States Circuit Court, District of Washington. December 31, 1900. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

IN EQUITY.

HENRY F. ALLEN,
Complainant,
vs.
PACIFIC NORTHWEST PACKING COMPANY (a Corporation), THE PACIFIC NORTHWEST PACKING COMPANY (a Corporation), AUSTIN CLAIBORNE, W. M. WILLIAMS and W. A. KEENE,
Defendants.
No. 872.

Answer of Defendant The Pacific Northwest Packing Company.

To the Honorable the Judges of the above-entitled Court:

Defendant The Pacific Northwest Packing Company, says, in answer to complainant's bill of complaint as the same has heretofore been amended after demurrer, as follows:

I.

This defendant admits the averments of each and every paragraph of the bill of complaint down to, but not including, paragraph IX.

II.

As to paragraph IX of the bill of complaint, this defendant admits the averments contained in the first division thereof; but as to the averments contained in the second division—that relating to insurance—this defendant denies that it has any knowledge or information. It admits that certain sums have been paid by complainant on account of insurance, but it has no knowledge or information concerning whether the amounts so paid by complainant was the sum therein named or not.

III.

As to paragraph X of complainant's bill of complaint, this defendant denies that none of the indebtedness therein referred to has been paid and avers the truth to be that sundry payments have been made which have not been credited on these notes, which payments will appear more certainly by an accounting hereinafter prayed for.

Further answering paragraph X of the bill of complaint, this defendant denies that there existed at the time of the filing of this foreclosure any insecurity to the lien thereof justifying foreclosure at that time.

IV.

As to paragraph XI of the bill of complaint, this defendant answers and says: It admits that the companies therein named, including this defendant, were engaged at the time of the foreclosure in the business therein described; it denies that the fall run of salmon was just beginning at that time; and denies that there was any ne-

cessity for the appointment of a receiver for the operation of the cannery at that time.

V.

As to pararaph XII, it admits that in the event of foreclosure by this suit, if the same shall have been properly begun, complainant is entitled to a reasonable attorney's fee.

VI.

It denies that the sum of five thousand dollars is a reasonable attorney's fee, and avers the fact to be that it is an unreasonable attorney's fee, and that anything more than twenty-five hundred dollars is an unreasonable attorney's fee.

And this defendant, answering further, waiving none of its denials or defenses as hereinbefore set forth and praying to have the benefit of the same as if herein specially pleaded, says:

That the indebtedness owed by it to complainant as narrated in the complainant's bill of complaint arose out of a relation between this defendant and complainant Allen by virtue of which complainant Allen was to advance, and did advance, divers sums of money from time to time, being the sums set out in the bill of complaint, to this defendant and was to receive, and did receive, in return the output of this defendant's cannery. Complainant Allen was at that time interested in a company in San Francisco, called the Griffith-Durney Company, of which he was president; and in consideration of the advances made by complainant Allen to this defendant it was agreed that the Griffith-Durney Company should, as

aforesaid, receive the entire pack or output of this defendant and receive a commission of five per cent for handling the same. This arrangement was exclusive as to the output of this defendant's pack. Complainant Allen was also to select the underwriters for the insurance, and did so select the underwriters for the insurance upon this defendant's property. And for the further advantage of complainant Allen, a bookkeeper was sent by him from San Francisco to supervise permanently and conduct the accounts of this defendant, all of which was a part of the understanding between complainant Allen and this defendant; and during a large part of the time when the indebtedness arose in favor of complainant Allen from this defendant this bookkeeper was in charge of the accounts of this defendant. In consequence of the intimate business relations thus established between complainant and this defendant, and the great variety of accounts arising out of insurance, taxes, commissions, shipments, and the like, this defendant avers that at this time it is just and equitable that an accounting be had between complainant and this defendant. This defendant denies that the amount is due on the divers notes and accounts claimed in the bill of complaint by complainant, but is unable to say at this time just how much is due. It admits that there is a liability in some amount, but denies that it is in the amount named, and avers the difference to be some thousands of dollars more favorable to this defendant than appears in the bill. At the time when the receiver was appointed the same being unexpected to this defendant, no accounting had been had be-

tween the parties and none has been had since. This defendant avers that a very great part of the information respecting those accounts is in the possession of the complainant Allen *along, the transactions* relating to many of the same having occurred in the city of San Francisco and through himself as agent for the receipt and sale of the pack and the placing of the insurance. And as to this defendant's transactions at its own offices in the State of Washington, these also were to a large extent under the control of complainant through its confidential bookkeeper aforesaid in charge of the accounts, for which reason and of the consequence of the confusion of affairs resulting from the change from possession of all the parties to that of a receiver this defendant is left in that situation in which it cannot rightfully apprise itself, and does not now know, its exact degree of liability to complainant.

Wherefore this defendant prays that the Court order an accounting between complainant and this defendant, and that the bill of complaint be dismissed as to so much thereof as shall be found not due and owing by this defendant.

THE PACIFIC NORTHWEST PACKING COMPANY,
By HARWOOD MORGAN,
Its Secretary.

BAUSMAN, KELLEHER & EMORY,
Solicitors for Defendant, The Pacific Northwest Packing Company.

Due service of within answer this 31st day of December, 1900, duly admitted.

PRESTON, CARR & GILMAN,
Attorneys for Complainant.

[Endorsed]: Answer of defendant The Pacific Northwest Packing Company. Filed in the United States Circuit Court, District of Washington. December 31, 1900. A. Reeves Ayres, Clerk. A. N. Moore, Deputy.

In the Circuit Court of the United States, for the District of Washington, Northern Division.

IN EQUITY.

HENRY F. ALLEN,
Complainant,
vs.
PACIFIC NORTHWEST PACKING COMPANY (a Corporation), THE PACIFIC NORTHWEST PACKING COMPANY (a Corporation), AUSTIN CLAIBORNE, W. M. WILLIAMS and W. A. KEENE,
Defendants.
F. W. COLER,
Intervenor.
No. 872.

Demurrer.

Demurrer of the above-named complainant, Henry F. Allen, to the complaint in intervention filed in this cause by F. W. Coler.

This complainant, by protestation, not confessing or acknowledging any or all of the matters or things in the said complaint in intervention contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said complaint in intervention, for that the same does not state such a case, or contain any statement of any facts or of any matter of equity entitling said F. W. Coler to intervene herein, or entitling the said F. W. Coler to any relief whatsoever against this complainant.

Wherefore the complainant prays judgment of this Court whether he shall be compelled to further answer said complaint in intervention, and he further prays to be dismissed therefrom with costs.

PRESTON, CARR & GILMAN,
Solicitors for Complainant.

I, E. M. Carr, of counsel for complainant, Henry F. Allen, do hereby certify that the foregoing demurrer to the complaint in intervention of F. W. Coler is, in my opinion, well taken and well founded in law and that the said demurrer is not interposed for delay.

E. M. CARR.

Subscribed and sworn to before me this, the 10th day of January, 1901.

[Notarial Seal] W. A. KEENE,
Notary Public in and for the State of Washington, Residing at Seattle.

Received copy of the within demurrer and service of same admitted this 10th day of January, 1901.

BAUSMAN, KELLEHER & EMORY,
Attorneys for Intervenor.

[Endorsed]: Demurrer. Filed in the United States Circuit Court, District of Washington. January 10, 1901. A. Reeves Ayres, Clerk. A. N. Moore, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division.

IN EQUITY.

HENRY F. ALLEN, Complainant,
vs.
PACIFIC NORTHWEST PACKING COMPANY et al., Defendants.
F. W. COLER, Intervenor.
No. 872.

Order Sustaining Demurrer.

This cause came on duly and regularly to be heard on this 14th day of January, 1901, upon the demurrer of the complainant to the complaint of intervention filed herein by F. W. Coler. The complainant appeared by his solicitors, Preston, Carr & Gilman, and the said intervenor appeared by his solicitors, Bausman, Kelleher & Emory.

After hearing argument of counsel, and being fully advised in the premises, it appeared to the Court that the said demurrer was well grounded in law.

Wherefore it is by the Court here and now ordered that the demurrer of the complainant herein to the complaint of intervention filed herein by F. W. Coler be, and the same is hereby, sustained.

Dated at Seattle in the District of Washington, this 14th day of January, 1901.

C. H. HANFORD,

Judge.

To the ruling of the Court sustaining said demurrer the intervenor, F. W. Coler, duly excepted and his exceptions were allowed. Opportunity was offered by the Court to the said intervenor to plead further, but the said intervenor in open court declined to plead further and elected to stand upon his said complaint.

C. H. HANFORD,

Judge.

Form approved.

BAUSMAN, KELLEHER & EMORY.

[Endorsed]: Order. Filed this 14th day of January, 1901. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division.

IN EQUITY.

HENRY F. ALLEN,
Complainant,
vs.
PACIFIC NORTHWEST PACKING COMPANY et al.,
Defendants.
F. W. COLER,
Intervenor.
No. 872.

Judgment.

This cause came on duly and regularly for hearing before the Court on this 14th day of January, 1901, upon the complaint in intervention filed herein by F. W. Coler and the demurrer thereto of the complainant, Henry F. Allen. The complainant appeared by his solicitors, Preston, Carr & Gilman, and the said intervenor appeared by his solicitors, Bausman, Kelleher & Emory. The said demurrer having been by the Court sustained, and the said intervenor having declined to plead further and elected to stand upon the said complaint, complainant in open court

moved for judgment upon the said complaint in intervention, and the said demurrer, which was granted.

Wherefore it is by the Court here and now ordered and adjudged that the complaint in intervention heretofore filed herein by F. W. Coler be, and the same is hereby, dismissed; and that complainant be not required to further answer the said complaint.

Dated at Seattle, in the District of Washington, this 14th day of January, 1901.

C. H. HANFORD,
Judge.

To the entry of the above judgment the intervenor, F. W. Coler, duly excepted and his exceptions were allowed.

C. H. HANFORD,
Judge.

Form approved.

BAUSMAN, KELLEHER & EMORY.

[Endorsed]: Judgment. Filed this 14th day of January, 1901. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division.

IN EQUITY.

HENRY F. ALLEN,
Complainant,
vs.
PACIFIC NORTHWEST PACKING COMPANY (a Corporation), THE PACIFIC NORTHWEST PACKING COMPANY (a Corporation), AUSTIN CLAIBORNE, W. M. WILLIAMS, and W. A. KEENE,
Defendants.
F. W. COLER,
Intervenor.
No. 872.

Petition for Appeal and Order Allowing Same.

The above-named intervenor, F. W. Coler, conceiving himself aggrieved by the judgment entered in this cause on the 14th day of January, 1901, does hereby appeal from it to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that this, his appeal, may be allowed, and that a transcript of the records and proceedings and papers upon which that judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated May 24, 1901.

BAUSMAN & KELLEHER,
Solicitors for Intervenor, F. W. Coler.

And now on this 24th day of May, 1901, it is ordered that an appeal be allowed as prayed for.

C. H. HANFORD,
District Judge Presiding in the Circuit Court.

[Endorsed]: Petition for Appeal and Order Allowing Same. Filed in the United States Circuit Court, District of Washington. May 24, 1901. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division.

IN EQUITY.

HENRY F. ALLEN,
Complainant,
vs.
PACIFIC NORTHWEST PACKING COMPANY (a Corporation), THE PACIFIC NORTHWEST PACKING COMPANY (a Corporation), AUSTIN CLAIBORNE, W. M. WILLIAMS, and W. A. KEENE,
Defendants.
F. W. COLER,
Intervenor.
No. 872.

Assignment of Errors.

Comes now Intervenor F. W. Coler and says that in the records and proceedings in this cause and in the judg-

ment entered in it January 14th, 1901, there is manifest error, as follows:

I.

The Court erred in sustaining complainant's demurrer to intervenor's complaint in intervention, and in dismissing that complaint upon intervenor's electing to stand thereon after demurrer sustained.

Wherefore, the intervenor, F. W. Coler, prays that the judgment of the Circuit Court of the United States for the District of Washington may be reversed.

BAUSMAN & KELLEHER,
Solicitors for Intervenor F. W. Coler.

[Endorsed]: Assignment of Errors. Filed in the United States Circuit Court, District of Washington. May 24, 1901. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division.

IN EQUITY.

HENRY F. ALLEN,
Complainant,
vs.
PACIFIC NORTHWEST PACKING COMPANY (a Corporation), THE PACIFIC NORTHWEST PACKING COMPANY (a Corporation), AUSTIN CLAIBORNE, W. M. WILLIAMS, and W. A. KEENE,
Defendants.
F. W. COLER,
Intervenor.
No. 872.

Bond on Appeal.

Know all men by these presents, that we, F. W. Coler, as principal, and S. Foster Kelley, as surety, are held and firmly bound, jointly and severally, unto Henry F. Allen, the complainant named above, to John H. McGraw, the receiver in this cause, and to defendants Pacific Northwest Packing Company and The Pacific Northwest Packing Company, and to each of them, in the penal sum of five hundred dollars ($500.00), to each or either or all of them to be paid.

Witness our hands this 24th day of May, 1901.

The condition of this bond is as follows: The above-named intervenor, F. W. Coler, has commenced an appeal to the United States Circuit Court of Appeals for the

Ninth Circuit in this cause from the judgment entered in it on the 14th day of January, 1901:

Therefore, if the said F. W. Coler shall prosecute such appeal to effect and answer all costs, if it shall fail so to do, then this obligation shall be null and void; otherwise shall remain in full force and effect.

F. W. COLER,
S. FOSTER KELLEY.

County of King,
District and State of Washington } ss.

Personally appeared before me, the undersigned, a notary public in and for the State of Washington, S. Foster Kelley, to me personally known to be the surety named in the foregoing bond, and who on oath deposes and states that he is worth the sum of five hundred dollars over and above all just debts and liabilities, and exclusive of property exempt from execution, in property within this State, and that he is a resident, householder, and freeholder within the district of Washington.

Witness my hand and official seal this 24th day of May, 1901.

[Notarial Seal] FREDERICK BAUSMAN,
Notary Public in and for the State of Washington, Residing at Seattle.

This bond approved May 24th, 1901.

C. H. HANFORD,
Judge.

[Endorsed]: Bond on Appeal. Filed in the United States Circuit Court, District of Washington. May 24, 1901. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division.

IN EQUITY.

HENRY F. ALLEN,
Complainant,
vs.
PACIFIC NORTHWEST PACKING COMPANY (a Corporation), THE PACIFIC NORTHWEST PACKING COMPANY (a Corporation), AUSTIN CLAIBORNE, W. M. WILLIAMS, and W. A. KEENE,
Defendants.
F. W. COLER,
Intervenor.
} No. 872.

Citation on Appeal (Copy).

United States of America,
District of Washington.
} ss.

To Henry F. Allen, Complainant Above Named, John H. McGraw, as Receiver Appointed in the Above-entitled Cause, and Defendants Pacific Northwest Packing Company and The Pacific Northwest Packing Company, Greeting:

You and each of you are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the city of San Francisco, in that Circuit, within thirty days from the date of this citation, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States for the District of Washington, in which F. W. Coler is appellant and you and each of you are respondents, to show cause, if any there be, why the decree rendered against appellant in that appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 24th day of May, 1901.

[Seal U. S. Circuit Court] C. H. HANFORD,
District Judge Presiding in the Circuit Court.

Service of copy of this citation acknowledged this 24th day of May, 1901.

PRESTON, CARR & GILMAN,
Solicitors for Henry F. Allen, and John H. McGraw, as Receiver in the Above-entitled cause.

[Endorsed]: Citation on Appeal. Filed in the United States Circuit Court, District of Washington. May 25, 1901. A. Reeves Ayres, Clerk. A. N. Moore, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division.

HENRY F. ALLEN,
Complainant,
vs.
PACIFIC NORTHWEST PACKING COMPANY (a Corporation), THE PACIFIC NORTHWEST PACKING COMPANY (a Corporation), AUSTIN CLAIBORNE, W. M. WILLIAMS, and W. A. KEENE,
Defendants.
F. W. COLER,
Intervenor.
No. 872.

Praecipe for Transcript.

To the Clerk of the Above Court:

You will please prepare a transcript for use on appeal in the above cause, and transmit the same to the United States Circuit Court of Appeals for the Ninth Circuit, including in the transcript the following:

1. Complainant's bill of complaint.
2. Order appointing McGraw receiver.
3. Order denying motion to vacate receiver's appointment.
4. Order allowing intervention of Coler.

5. Bill of intervention of Coler.

6. Answer of defendant The Pacific Northwest Packing Company.

7. Demurrer to intervenor Coler's complaint.

8. Order sustaining demurrer to intervention of Coler, with exception thereto.

9. Judgment dismissing intervention of Coler, with exception thereto.

10. Petition for appeal and its allowance.

11. Assignment of errors.

12. Bond on appeal.

13. Citation on appeal.

14. Order taking bill pro confesso against defendants Williams, Claiborne, and Keene.

BAUSMAN & KELLEHER,
Solicitors for Intervenor Coler.

[Endorsed]: Praecipe for Transcript. Filed in the United States Circuit Court, District of Washington. May 24, 1901. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division.

IN EQUITY.

HENRY F. ALLEN,
Complainant,
vs.
THE PACIFIC NORTHWEST PACKING COMPANY et al.,
Defendants.
F. W. COLER,
Intervenor.
No. 872.

Clerk's Certificate to Transcript.

United States of America,
District of Washington,
} ss.

I, A. Reeves Ayres, Clerk of the Circuit Court of the United States for the District of Washington, do hereby certify the foregoing sixty-six (66) typewritten pages, numbered from one (1) to sixty-six (66), both inclusive, to contain in themselves, and not by reference, a complete record and transcript of the final record and of all the papers, exhibits and proceedings necessary to the hearing of the appeal of F. W. Coler, as intervenor in a case numbered 872 in this court, wherein Henry F. Allen is complainant and Pacific Northwest Packing Company and others are defendants, and in which said F. W. Coler is intervenor.

I further certify that the costs of preparing and certifying the foregoing transcript is the sum of $20.15, and that said sum has been paid to me by the appellant F. W. Coler. No opinion has been given or filed in said cause in respect of the intervention of F. W. Coler.

In witness whereof I have hereunto set my hand and affixed the seal of said Circuit Court, at my office in the city of Seattle, in said District this 17th day of June, 1901.

[Seal] A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the District of Washington.

By R. M. Hopkins,
Deputy Clerk.

[Ten Cents U. S. Int. Rev. Stamp. Canceled.]

In the Circuit Court of the United States for the District of Washington, Northern Division.

IN EQUITY.

HENRY F. ALLEN, Complainant,
vs.
PACIFIC NORTHWEST PACKING COMPANY (a Corporation), THE PACIFIC NORTHWEST PACKING COMPANY (a Corporation), AUSTIN CLAIBORNE, W. M. WILLIAMS, and W. A. KEENE, Defendants.
F. W. COLER, Intervenor.
No. 872.

Citation on Appeal (Original).

United States of America, District of Washington, } ss.

To Henry F. Allen, Complainant Above Named, John H. McGraw, as Receiver Appointed in the Above-en-

titled Cause, and Defendants Pacific Northwest Packing Company and The Pacific Northwest Packing Company, Greeting:

You and each of you are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the city of San Francisco, in that Circuit, within thirty days from the date of this citation, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States for the District of Washington, in which F. W. Coler is appellant and you and each of you are respondents, to show cause, if any there be, why the decree rendered against appellant in that appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 24 day of May, 1901.

[Seal] C. H. HANFORD,
District Judge Presiding in the Circuit Court.

Service of copy of this citation acknowledged this 24 day of May, 1901.

PRESTON, CARR & GILMAN,
Solicitors for Henry F. Allen, and John H. McGraw, as Receiver in the Above-entitled Cause.

[Endorsed]: No. 872. In the Circuit Court of the United States, District of Washington. Henry F. Allen, Plaintiff, vs. Pacific Northwest Packing Company et al., De-

fendants. Citation on Appeal. Filed in the United States Circuit Court, District of Washington. May 25, 1901. A. Reeves Ayres, Clerk. A. N. Moore, Deputy. Bausman, Kelleher & Emory, Attorneys for F. W. Coler. Rooms 626, 627 and 628 Bailey Building, Seattle, Washington.

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[Endorsed]: No 713. In the United States Circuit Court of Appeals for the Ninth Circuit. F. W. Coler, Appellant, vs. Henry F. Allen, John H. McGraw, as Receiver, and Pacific Northwest Packing Company (a Corporation), and The Pacific Northwest Packing Company (a Corporation), Appellees. Transcript of Record. Appeal from the Circuit Court of the United States for the District of Washington, Northern Division.

Filed June 20, 1901.

F. D. MONCKTON,
Clerk.
By Meredith Sawyer,
Deputy Clerk.

No. 713

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

F. W. COLER, *Appellant,*

vs.

HENRY F. ALLEN, PACIFIC NORTHWEST PACKING COMPANY, a corporation; THE PACIFIC NORTHWEST PACKING COMPANY, a corporation; AUSTIN CLAIBORNE, W. M. WILLIAMS and W. A. KEENE, and JOHN H. McGRAW as Receiver.

No. 713

APPEAL FROM THE CIRCUIT COURT FOR THE DISTRICT OF WASHINGTON.

BRIEF OF APPELLANT

BAUSMAN & KELLEHER,
Counsel for Appellant.

LOWMAN & HANFORD S. & P. CO., SEATTLE.

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

F. W. COLER, *Appellant*,

vs.

HENRY F. ALLEN, PACIFIC NORTHWEST PACKING COMPANY, a corporation; THE PACIFIC NORTHWEST PACKING COMPANY, a corporation; AUSTIN CLAIBORNE, W. M. WILLIAMS and W. A. KEENE, and JOHN H. McGRAW as Receiver,

No. 713.

APPEAL FROM THE CIRCUIT COURT FOR THE DISTRICT OF WASHINGTON.

BRIEF OF APPELLANT

SPECIFICATION OF ERROR.

I.

The lower court erred in sustaining complainant's demurrer to intervenor's complaint in intervention and in dismissing that complaint upon intervenor's electing to stand thereon after demurrer sustained.

STATEMENT.

Appellant is a judgment creditor of the respondent, The Pacific Northwest Packing Company, upon whose property respondent Allen is foreclosing a mortgage. He had applied for and been granted leave to intervene in the foreclosure, had filed his complaint in intervention in pursuance of the leave given, and had been met with a demurrer by the complainant. The demurrer being sustained by the lower court, the intervenor refused to plead further, elected to stand on his complaint, suffered judgment in consequence, and appealed to this court.

The allegations of the intervenor may briefly be summed up: Coler derived his claim from The Seattle National Bank, which is alleged to have become a creditor of the packing company February 17, 1900, before the later and larger of its two mortgages sought to be foreclosed was executed. His claim passed into judgment in the State Court while the foreclosure was proceeding. At that time the properties of the foreclosure defendants were in the hands of a receiver in the foreclosure action, and it was alleged that any attempt to satisfy the judgment by execution would be idle and nugatory. It was also complained that the defendant, The Pacific Northwest Packing Company, which had given the mortgage complained of, had at the time of doing so "reached a point were its debts were greater than its property, where it could not pay in the ordinary course, where its business was no longer profitable, and

when it ought to be wound up and its assets distributed", that the mortgage was void under the laws and decisions of the State of Washington as a preference to creditors by an insolvent corporation. Complainant's bill itself has by this court been held to indicate corporate insolvency at the date on which it was filed. "We think it may be inferred from the allegations of the bill that the defendant corporation was at that time insolvent." (*Allen v. Pacific Northwest Packing Co.*, — *Fed.* —.)

It will be noticed that three points, which sometimes arise in these cases, are happily removed from discussion here. First, this is not a case of refusal to allow intervention. That had already been permitted by express order, and the ruling against Coler was that in his attempt to set aside the mortgage or have a share of it, he had not stated a cause of action. Second, he is not a subsequent creditor of the defendant corporation, whose preference he complains of, but, proceeding on an indebtedness antedating the mortgage, is a prior creditor complaining of a debtor's subsequent conveyance. Third, the claim on which he proceeds is in judgment and it is not as a mere contract creditor that he has intervened.

ARGUMENT.

The policy of the State of Washington in respect to insolvent corporations has been settled during several years (and most firmly settled), that when they have

reached such a point as is described in the complaint in intervention they can give no preference. This was first decided in the case of *Thompson v. Huron Lumber Company*, 4 Wash., 600. The court there used the exact language embodied in the present complaint in intervention, and already quoted in this brief, nor from the date of that decision to the present time has it ever varied in these rulings.

Conover v. Hull, 10 Wash. 673.
Biddle Purchasing Co. v. Port Townsend Steel and Wire Co., 16 Wash. 681.

A few preferences have escaped the rule, but only by being distinguished from it on the facts. The last utterance of the Supreme Court of the State well illustrates this.

Strohl v. Seattle National Bank, 64 Pacific, 916.

There, to be sure, the corporate preference was sustained, because a state of facts was shown that did not bring the corporation within the condition described in the Huron case, for it appeared that the corporation was doing a good business and had assets greater than its liabilities; but even there the court reiterated that rule and its repeated decisions sustaining it, quoting again the language used in the *Huron* case, and exactly repeated in the intervenor's complaint as the condition of this corporation. That language, we may add, is more unfavorable to preferences than we have used in following it. If the corporate debts are even *equal* to the assets the conveyance is forbidden, if, as alleged,

the business be unprofitable and the company no longer pays in the ordinary course.

Nor is this state of law in Washington a peculiar and unreasonable exception to the policy of other states. It is not the course of decision and the policy of a remote and too radical community, but is firmly imbedded in the jurisprudence of nearly one-half the States of the Union.

Thompson on Corporations, Sec. 6492.
27 Amer. L. Rev. 846.

Now, the Supreme Court of the United States has decided that the decisions of a State Supreme Court on this identical question of corporate preference are binding upon the federal courts, and has followed the Supreme Court of the State of Ohio.

George T. Smith Middlings Purifier Company v. McGroarty, 136 U. S. 237.

It discusses the rule as in that state established by *Rouse v. Bank* (46 Ohio St. 493, 22 N. E. 293), and says:

"That decision, it is true, proceeded in part upon a theory that the property of an insolvent incorporation is a trust fund for its creditors in a wider and more general sense than could be maintained upon general principles of equity jurisprudence. But it also proceeded in large part, as the opinion clearly shows, upon the constitution of Ohio, and the laws and policy of that state, as declared in previous decisions of its highest court, and should therefore be accepted by this court as decisive of the law of Ohio upon the subject. *It would*

be an extraordinary result, if the courts of the United States, in exercising the jurisdiction conferred upon them with a view to secure the rights of citizens in different states, should hold such a conveyance to be valid against citizens of other states as the Supreme Court of Ohio holds void as against its own citizens."

This citation would seem to us to be conclusive of the present question. The courts of the State of Washington have decided that corporations in exactly the condition described in the complaint can give no preference. The leading case in this state *(Thompson v. Huron Lumber Company, supra)* describing the condition which shall place a preference beyond corporate power used exactly the language used by the intervenor here. That language was there held sufficient, and ever since has been held sufficient, in the State of Washington. It was a case, too, of mortgage foreclosure (like this) attacked by intervening creditors, of whom some had their claims in judgment. Nay, more, our supreme court also refers to the *Rouse* case in Ohio, adopts its reasoning, and finally notes the close resemblance between the Ohio statutes and our own. (See pages 605 and 610 of the *Huron* case). It thus follows the very Ohio case by which the United States Supreme Court admits itself to be controlled.

We should be at a loss, therefore, to understand the position of the lower court in this instance were it not for the fact that Judge Hanford has indicated that *Sanford Fork and Tool Company v. Howe*, 157 U. S. 312, on the same subject, furnishes a ruling which he ought to follow. In that case the Supreme Court refused to

declare void a preference by an insolvent corporation. Whether that corporation was in as bad straits as the one involved here, or the one involved in the Ohio instance, it is profitless to consider. The Supreme Court was not called upon to consider any rule of local law in Indiana from which the case was appealed. So far as we are concerned, then, the other side may cheerfully take the position that the Sanford Fork and Tool Company was in a worse condition than the Packing Company here. It is very doubtful if it was, but for that we do not care. The preference by the Fork and Tool Company did not have to be tested by any state decision. The Supreme Court was left free to do as it pleased about it. Its decision represents only its own views on that phase of the law. Had the decision been a repudiation of decisions in Indiana, or a refusal to follow any such course of decision, it would have been in point here. It will be noticed that the Supreme Court did not find it necessary even to refer to the decision in the case of the Purifier Company. There was no reason why it should. There is no connection between the cases and one does not overrule or limit the other.

The view suggested by the lower court here, as we remember it, was that the Supreme Court followed the Ohio court, because the corporation which gave the preference there had ceased to do business and was not a going concern at all; that in the later case of the Fork and Tool Company the Supreme Court sustained the corporate preference because the corporation, though

perhaps insolvent, was still a going concern. This means that the Supreme Court will follow these State decisions where the corporation has been obliged to cease operation, but will not follow them as to corporations insolvent but still going. Now, such a test, we may respectfully say, seems to us to overlook entirely the true grounds of the decision in the first instance. The preference by the Ohio company was declared void because the courts of the State of Ohio would have held it so. The degree of corporate insolvency was not considered. Such consideration would have involved the reasonableness of the Ohio rule of property, and that was not proper inquiry for federal courts. Those courts, as the decision said, must enunciate the same rule for the citizens of other states concerning property in Ohio as the citizens of that state would have to follow. In fact, the Supreme Court, in the quotation we have made above, indicate that, if left to itself, in the Ohio case, it would have laid down a perhaps different rule from that of the Ohio court, for it conceded that the latter court "was proceeding in part upon a theory that the property of an insolvent corporation is a trust fund for its creditors in a wider and more general sense than could be maintained upon general principles of equity jurisprudence". It acknowledges, however, its duty to follow the Ohio policy and gives excellent reasons for being obliged to do so.

The decision in the Fork and Tool Company's case, as contrasted with that in the case of the Purifier Company, represents a phase of federal decision thoroughly

understood. In *White v. Cotzhausen*, 129 U. S. 329, the Supreme Court of the United States felt itself bound by the course of decisions in Illinois, where a string of simultaneous conveyances would be regarded as an assignment under the local law and not as so many transfers or conveyances. But when the Supreme Court had before it *Union Bank v. Kansas City Bank*, 136 U. S. 223, a case arising in Missouri, it held that a sweeping mortgage was not an assignment because the Missouri courts had so decided, and it had to overrule and possibly in a mild degree reprove the action of the lower federal judges, who, notwithstanding those state decisions, had continued to apply a different rule. The Supreme Court distinguished the *Cotzhausen* case just cited and showed that it had no application because decided under the rules of another state. Still later we have them in *May v. Tenney*, 148 U. S. 60, following the Colorado rule without feeling themselves in the least degree inconsistent as to the cases already cited.

In the law of chattel mortgages, too, we find the same variation, a variation without inconsistency, on the part of the Supreme Court. *Robinson v. Elliott*, 22 Wallace, 513, and *Means v. Dowd*, 128 U. S. 273, were decisions that had founded a very common opinion in the profession as to the validity and invalidity of chattel mortgages. Later came the case of *Etheridge v. Sperry*, 139 U. S. 266, which is not consistent with those cases at all; but this last case was one in which the Supreme Court were bound by the decisions of the State of Iowa.

We feel it useless to prolong this brief. Unless such

a distinction as that suggested by the lower court can be sustained it seems to us the ruling on the demurrer here must be reversed. That distinction it seems to us impossible to apply.

It cannot be denied that if a citizen of our own state were foreclosing this mortgage, as he would have to do, in the courts of this state, it would be adjudged void, and judgment creditors like Coler would, under the *Huron Lumber Company* case, be admitted to share. Is a different rule to be applied to the property because the mortgage is foreclosed by Allen, the citizen of another state? By no means. This would cause just what the Supreme Court of the United States in the case of the Purifier Company has said would be "an extraordinary result."

Respectfully submitted,

BAUSMAN & KELLEHER,
Counsel for Appellant.

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

F. W. COLER, *Appellant,*

vs.

HENRY F. ALLEN; PACIFIC NORTHWEST PACKING COMPANY, a corporation; THE PACIFIC NORTHWEST PACKING COMPANY, a corporation; AUSTIN CLAIBORNE, W. M. WILLIAMS and W. A. KEENE, and JOHN McGRAW, as Receiver, *Appellees.*

No. 713

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLEES HENRY F. ALLEN AND JOHN H. McGRAW AS RECEIVER.

HAROLD PRESTON,
E. M. CARR and
L. C. GILMAN,
Solicitors for Appellees,

E. M. CARR,
Counsel.

LOWMAN & HANFORD STATIONERY & PRINTING CO., SEATTLE.

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Solicitors for Appellees.

E. M. CARR,
Counsel.

ARGUMENT ON MOTION TO DISMISS APPEAL.

The appellees have filed and served within the rules of court a motion to dismiss this appeal, as follows:

"IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

F. W. Coler, Appellant, vs. Henry F. Allen; Pacific Northwest Packing Company, a corporation; The Pacific Northwest Packing Company, a corporation; Austin Claiborne, W. M. Williams and W. A. Keene, and John H. McGraw, as Receiver, Appellees.	No. 713.

MOTION TO DISMISS APPEAL.

Come now the appellees Henry F. Allen, complainant, and John H. McGraw, receiver herein, and respectfully move this honorable court that the appeal of F. W. Coler, intervenor herein, be dismissed, upon the ground that no service of the citation on appeal has ever been made upon the defendant Pacific Northwest Packing Company, a corporation, or upon the defendant The Pacific Northwest Packing Company, a corporation, or upon the defendant Austin Claiborne, or upon the defendant W. M. Williams, or upon the defendant W. A. Keene, and that neither one of the said defendants has ever been served with said citation upon appeal.

This motion is based upon the record herein.

E. M. CARR, Counsel.

HAROLD PRESTON,
E. M. CARR,
L. C. GILMAN,

Solicitors for Appellees Henry F. Allen and John H. McGraw, Receiver."

The action was brought by appellee Henry F. Allen in the lower court to foreclose certain mortgages given to him by the corporation defendants. Appellant obtained leave, as a judgment creditor of the corporation, to intervene in the foreclosure suit. He filed an intervening complaint attacking the validity of complainant's mortgages and asserting the right of all of the creditors of the corporation to share equally and ratably in the distribution of the corporate assets. The defendants Claiborne, Williams and Keene held some of the corporate property in trust for the corporation defendant and complainant. Neither of them appeared or answered, and the bill was taken *pro confesso* as against them. The defendant, The Pacific Northwest Packing Company, was the successor of the defendant Pacific Northwest Packing Company, and had become the owner and holder of all of the property originally owned by the first named corporation defendant, and had become obligated for all of the indebtedness of that corporation. It answered the complainant's bill of complaint and resisted the foreclosure of the mortgages. It appears from the record that no service of the citation on appeal has ever been made upon any of the defendants above named. It is clear that the defendant The Pacific Northwest Packing Company at least is directly interested in the decision of the questions involved in this appeal. Upon the decision of that appeal depends the question of whether the complainant, as mortgagee, is entitled to receive the proceeds of the property mortgaged to him, or whether those proceeds shall be distributed equally and ratably amongst all the creditors of the corporation.

In support of the motion we consider it only necessary to cite the case of

American Loan & Trust Co. vs. Clark, 83 Fed, 230.

decided by this court, and the decision of the Supreme Court of the United States in

Davis vs. Mercantile Trust Co., 14 Sup. Court Rep., 693.

Without waiving the motion to dismiss the appeal, appellees respectfully ask leave to present the following statement and argument on the case upon its merits.

STATEMENT OF THE CASE.

On and prior to the 20th day of October, 1898, the defendant Pacific Northwest Packing Company was a corporation, organized and existing under and by virtue of the laws of the state of Washington, engaged in the business of catching, buying, packing and selling salmon. On the 20th day of October, 1898, the said defendant had become indebted to the appellee Henry F. Allen in the sum of $15,000. From the answer of the defendant The Pacific Northwest Packing Company, the successor of the said defendant Pacific Northwest Packing Company, set out in the printed record, which answer is undisputed by appellant, it appears that a very intimate relation had existed and did exist between the said defendant and the appellee, and that in fact the appellee was the principal if not the only source of pecuniary supplies for the said defendant, and that the advances made by the appellee, and undertaken to be made by him, had enabled the said defendant to carry on its said business. It is alleged in the said answer:

"That the indebtedness owed by it to complainant, as narrated in complainant's bill of complaint, arose out of a relation between this defendant and complainant (Allen), by virtue of which complainant (Allen) was to advance and did advance divers sums of money from time to time, being the sums set out in the bill of complaint, to this defendant, and was to receive and did receive in return the output of this defendant's cannery."

On the said 20th day of October, 1898, the defendant Pacific Northwest Packing Company, for the purpose of securing the indebtedness then existing from it to the appellee, executed

and delivered the mortgage of that date set out and described in the bill of complaint. Thereafter, and up to the 11th day of May, 1900, the appellee advanced further sums to the said defendant and its successor, The Pacific Northwest Packing Company, aggregating the sum of $25,734. On the said 11th day of May, 1900, the defendant The Pacific Northwest Packing Company, for the purpose of securing the payment of the said further advances, and for the further purpose of securing other advances then undertaken to be made by the appellee to the said defendant for use in its business, and to enable it to carry on and continue its business, made, executed and delivered to appellee the second mortgage set out in the bill of complaint. The advances undertaken to be made by the appellee in addition to the said sum of $25,734 were thereafter made to the said defendant by the appellee from time to time, as required by the said defendant in the conduct of its business. The advances made subsequent to the execution of the mortgage aggregated more than $10,000.00. On the 8th day of September, 1900, no payments having been made by the defendant upon account of any of the said indebtedness, appellee filed in the lower court his bill for the foreclosure of the said mortgages. Upon the filing of the bill an order was made by the lower court appointing a receiver of all of the mortgaged property. Thereafter, on the 31st day of December, 1900, appellant filed in the lower court his complaint in intervention. A demurrer was sustained to the said complaint in intervention, and this appeal is from the judgment rendered upon the hearing of said demurrer dismissing said complaint in intervention.

ARGUMENT.

The complaint in intervention is based entirely upon the so-called "trust fund doctrine" as it is claimed by appellant to be established by the decisions of the Supreme Court of the State of Washington. No attack is made in the said intervening complaint upon the mortgage of October 20, 1898. It is directed entirely to the mortgage of May 11, 1900. The material allegations of the said intervening complaint as to the said mortgage are as follows:

"That at the time of giving this mortgage, the defendant The Pacific Northwest Packing Company had reached a point where its debts were greater than its property, where it could not pay in the ordinary course, where its business was no longer profitable and when it ought to be wound up and its assets distributed."

It is contended by appellant that, conceding these allegations to be true, he as a judgment creditor and all other creditors of the defendant corporation were entitled to share in a ratable and equal distribution of the property of the defendant corporation, and that the preference attempted to be given by the said mortgage was void as against the general creditors of the corporation. In support of this proposition appellant relies:

First, upon the decisions of the Supreme Court of the State of Washington as enunciating the law of that state, and

Second, upon the decision of the Supreme Court of the United States rendered in the case of *George D. Smith Middlings Purifier Co. vs. McGroarty*, 136 U. S., 237, as establishing the doctrine that the decisions of the Supreme Court of the State of Washington upon the question of the validity of preferences made, or attempted to be made, by corporations, are binding upon the courts of the United States.

In the Purifier Company case, the Supreme Court of the United States held, in effect, that the determination of the question raised as to the validity of the mortgage made by the corporation depended upon a construction of the constitution and statutes of the State of Ohio, and that the Supreme Court of that state had held that under the constitutional and statutory provisions of the state the mortgage in question was void as to general creditors.

In rendering its decision the Supreme Court was careful to point out the fact that the decision of the Supreme Court of Ohio was based upon the construction and application of the constitutional and statutory provisions of the state relating to corporations, and was careful to say in effect, that if the Ohio court had based its decision upon its view of the trust fund doctrine, the decision could not have been followed by the federal courts.

In the opinion of the Ohio court in the Rouse case, the constitutional and statutory provisions under consideration are clearly set out by the court. These provisions are very different from any existing in the State of Washington. As we read the opinion, the decision is based squarely upon the construction of the statute law. We understand what is said by the court regarding the general trust fund doctrine to be a mere expression of its views, and not necessary to the decision of the case.

It may be noted, in passing, that the allegations of appellant's complaint fall far short of bringing this case within the doctrine announced in the Rouse case. The Ohio court summed up its conclusions as follows:

"Without extending the discussion, we are of the opinion that when a corporation for profit, organized under the laws of this state, becomes insolvent, *and ceases to carry on its business or further pursue the purposes of its creation,* the corporate property constitutes a trust fund," &c., &c. (The italics are

ours.) This was a far different state of facts than are claimed to exist in this case.

Appellant, on page 5 of his brief, declares that the Supreme Court of the United States has decided that the decisions of a state supreme court on the question of corporate preferences are binding upon the federal courts. The Purifier Company case is the only case cited in support of this statement, and as we understand the decision in that case, it falls very far short of sustaining appellant's contention. To make the decision in the Purifier Company case applicable here, it would be necessary for appellant to show that the Supreme Court of the state had decided that the statute law of the state rendered void a preference given by a corporation under the circumstances set out in the appellant's complaint. As a matter of fact, no such statute exists in the state of Washington, the supreme court has not at any time claimed to have construed any such statute, and furthermore, the supreme court of the state has never decided that a mortgage given under the circumstances shown in the case at bar constituted an illegal preference.

The origin of the trust fund doctrine in the State of Washington is to be found in the case of *Thompson vs. Huron Lumber Company*, 4 Wash., 600. The decision of that case was in no wise predicated upon any constitutional provision or statute of the State of Washington. It is true that in an opinion rendered denying a petition for rehearing in that case, the court said (p. 610):

"Our decision is vigorously attacked by reason of its adoption of the trust fund theory, and it is argued that Rouse vs. Merchants National Bank, 6 O. St., 493, was decided upon Ohio statutes, of which we have none. But careful reading of that case shows that, with one or two exceptions, the statutory provisions there alluded to were identical in substance with

our own, and an examination of the statutes of Ohio on the subject of corporations further reveals the similarity. If, therefore, as it is contended, the adoption of the trust fund theory has everywhere depended upon statutes, the appellant has no ground to stand upon, for we have the substance of all the statutes on the subject, with the addition of one expressly giving jurisdiction to the courts to appoint receivers of insolvent corporations."

As before stated, the decision was not predicated upon any constitutional or statutory provision of the state. The court says that, with one or two exceptions, the statutory provisions alluded to in the Rouse case are identical in substance with those of Washington. What particular statute was being construed by the Supreme Court is not pointed out, and it cannot be found from the most careful reading of the opinion that any statute was the subject of construction.

The allusion to the statute expressly conferring upon the courts of the state jurisdiction to appoint receivers of insolvent corporations carries no weight, for that jurisdiction existed independent of any statute. The jurisdiction was inherent in the courts of the state as courts of equity. The statute did not enlarge that jurisdiction. If it curtailed it the argument would be the other way. The decision in the Thompson case and the decisions in all other cases decided by the Supreme Court of the State of Washington on the same subject were based entirely upon the trust fund doctrine as enunciated in the decisions of various state courts, and were entirely independent of any constitutional or statutory provision. All of those decisions were predicated upon the particular facts of each case.

In the Thompson case it was held by the court that "the mortgage was designed to act as a shield between the corporation and its other creditors while it prosecuted its ordinary

business for an indefinite length of time. * * *" This was the conclusion of the court, and upon this conclusion its decision was based. Having so decided, the court proceeded to say:

"But for another reason we should hold this mortgage bad. The indebtedness evidenced by the notes was long overdue; the directors of the company could not agree; the business was practically stopped and the corporation was insolvent. The insolvency was formally adjudged fifteen days after the mortgage was made, upon the petition of appellant himself." (The appellant was the mortgagee.) "In that time no material change took place in the company's affairs. For many months it had been embarrassed, could pay nothing upon its debts, and was merely using up its property without profit over working expenses. Ball, who was a director, knew of this; and it is useless to argue that a creditor of the dignity of a national bank was not informed. Under these circumstances, a court of equity in this state ought not to enforce any voluntary preferences attempted by the directors of a corporation."

From the above quotations it clearly appears that the decision of the court was predicated upon facts which, in the opinion of the court, clearly showed that the attempted preference was in law fraudulent. The decision of the court must be read and understood in the light of the facts which were before it. General remarks upon the theory of the law applied by the court to those facts should be and are no more binding upon any court than they were intended to be upon the court rendering the decision.

In the case of *Conover vs. Hull*, 10 Wash., 673, the court found that there had been actual collusion between the officers of the corporation, after its hopeless insolvency had become established, and certain favored creditors of the corporation,

for the purpose of giving to those favored creditors unwarranted preferences. The court said (p. 679):

"When we come to think that this preferred distribution is made by the managers, who represent the stockholders who are in no way responsible for the debt, or at least that portion of it which is in excess of their liabilities, why should they, thus disinterested, be allowed to confer these benefits upon favorites to the exclusion of the rights of other honest creditors who have helped to furnish the means which constituted the very fund which is now being distributed to the exclusion of their interests? Certainly, it is but a just provision of law which holds that this fund, under such a condition, must be held intact as a trust fund for the equal benefit of all the creditors."

Nothing further need be said in support of the proposition that the decision in the Conover case was predicated entirely upon the application of the trust fund doctrine as applied to the facts of that particular case. If anything further were necessary, it would be only to quote the concluding paragraph of the opinion in that case:

"All the circumstances surrounding this litigation convince us that the insolvent condition of this company was known to the appellants; that there was a desire on the part of the company to prefer these appellant creditors, and that the condition of the company was made known to them for the express purpose of warning them that they should not delay in the commencement of their actions; and that the result of this knowledge and action on the part of the company and of these appellants was to obtain liens upon the property of this corporation in fraud of the rights of other creditors."

In the case of *Biddle Purchasing Co. vs. Port Townsend Steel, &c., Co.,* 16 Wash., 671, cited by appellant, the court said (p. 693):

"The mortgage itself was clearly a preference by an insolvent corporation of one of its creditors. It was executed as security for an antecedent debt. Such a preference cannot be maintained."

To sustain appellant's contention that the Federal Courts are bound in this case by the decisions of the Supreme Court of the State of Washington, it should be shown that that court has held that under the constitutional and statutory provisions of the state no corporation, in fact insolvent, can create a preference in favor of one creditor to the exclusion of its other creditors. That court has not announced any such rule, and has in fact held in certain cases that preferences made by corporations in fact insolvent were valid.

The mortgage attacked by appellant was made by a corporation which was then carrying on the business for which it was organized. Regardless of the affirmative allegations contained in the answer of the defendant corporation, the truth of which are conceded by appellant, it is clear both from the appellee's bill of complaint and the intervening complaint that at the time said mortgage was given, the corporation was a going concern, carrying on its corporate business, and needing for the successful prosecution of said business advances of money. It is not claimed that complainant knew that the company was insolvent or should have so known, or that he had any reason to believe or even suspect that it was insolvent. He dealt with it as a solvent, going concern. The mortgage was not only made for the purpose of securing an indebtedness then existing, but for the further purpose of securing advances which might or might not be thereafter required by the corporation in the prosecution of its business. It appears that the further advances provided for were required and were made by the appellee to the extent of over $10,000.00. From the date of the said mortgage, May 11th, 1900, until the 8th day of Sep-

tember, 1900, it appears that the corporation continued to carry on its business without molestation, by suit or otherwise, from any of its creditors. On the 8th day of September, 1900, the appellee having received no payments on account of any of the advances made by him, began his suit for the foreclosure of the mortgages given to him. Upon that day a receiver was appointed to take charge of the mortgaged property and to hold and operate it under the orders of the lower court. The receiver's possession of the mortgaged property and his conduct of the business of the corporation was not assailed by any creditor until the 31st day of December, 1900, when appellant's complaint in intervention was filed in the lower court. That complaint in intervention, as before pointed out, was based entirely upon the allegations that at the time of giving the mortgage in question the defendant corporation had reached a point where its debts were greater than its property, where it could not pay in the ordinary course, where its business was no longer profitable, and when it ought to be wound up and its assets distributed. No knowledge of any of these alleged facts was imputed to complainant. The lower court held that this intervening complaint did not state facts sufficient to sustain the intervention and the claim made by appellant.

As clearly pointed out in the opinion of the Supreme Court of the United States in the Rouse case, the decision of the Supreme Court of the State of Ohio, so far as it was based upon the trust fund doctrine, proceeded upon the theory that the property of an insolvent corporation is a trust fund for its creditors in a wider and more general sense than could be maintained upon general principles of equity jurisprudence.

No claim is made by the Supreme Court of the State of Washington that its decisions upon this question rest upon any other foundation than that of general principles of equity jurisprudence. As before pointed out, it is true that when challenged

upon its application of these principles it stated that "*with one or two exceptions*" the statutory provisions alluded to in the Rouse case were identical in substance with those of Washington. What the exceptions are is not stated, and it is not claimed that the decision in the Thompson case is based upon the construction of any constitutional or statutory provision. It is clearly held by the Supreme Court of the State of Ohio and by the Supreme Court of the United States, in its decision upon the appeal from that case, that the decision was based upon a construction of certain constitutional and statutory provisions of the State of Ohio, and for that reason, and that reason only, the Supreme Court of the United States considered itself bound by the decision of the state court in an exactly similar case. That case was decided on May 19th, 1890.

In a later case, decided on March 25th, 1895,

Sanford Fork & Tool Co. vs. Howe, Brown & Co., 157 U. S., 312,

the Supreme Court clearly stated its position upon this trust fund doctrine. The facts in that case supporting the attack upon the mortgage made by the corporation, were far stronger than the facts alleged in the intervening complaint in the case at bar. The mortgage attacked in that case was given to the directors of the corporation itself. It was given as security for a past indebtedness, but further to induce the endorsers (the directors) to obtain for the corporation a renewal or extension of its obligations and to make further endorsements. There was a loaning to the corporation of the credit of its own directors. In the case at bar the appellee had furnished, long prior to the giving of the mortgage in question, the large sum of $15,000 for the use of the corporation in its business, and had received as security a mortgage, the validity of which is in no wise questioned. It is not made to appear, and is not even claimed by appellant, that anything whatever had been paid by

the stockholders of the corporation upon the stock of the company. It seems reasonably clear from the showing made by the original bill of complaint, the answer of the defendant corporation and appellant's intervening complaint, that the appellee had furnished practically all of the funds used by the corporation in the prosecution of its business. The corporation was still a going concern, carrying on its corporate business. It continued to carry on its business and obtained from the appellee from time to time, as its necessities arose, large sums of money, in addition to the indebtedness existing at the time the mortgage in question was made. Can it be doubted for a moment that at the time of giving this mortgage securing not only advances theretofore made without security upon the faith and credit of the value of the corporation's property and business, but also advances thereafter to be made as required in the prosecution of that business, the corporation, its stockholders and officers and the appellee regarded the corporation as a going and solvent concern? Such being the fact, can it be said that the charge made six months thereafter that at the time the mortgage was given, the corporation had reached a point where its debts were greater than its property, where it could not pay in the ordinary course, where its business was no longer profitable, and when it ought to be wound up and its assets distributed, if conceded to be true, rendered the mortgage void as to the general creditors of the corporation? Such is not the law as declared by the federal courts. As said in *Sanford Fork & Tool Co. vs. Howe, supra*, after discussing the effect of the mortgage given to the directors of the corporation:

"Nor is it the case of the directors of a corporation, in fact insolvent, though continuing and expecting to continue in business, executing a mortgage on the property of the corporation to simply secure themselves for a past indebtedness; for here the corporation, although insolvent within the rule which de-

clares that insolvency exists when the debtor has not property sufficient to pay its debts, was still a going concern and intending to continue its business, and the mortgage was executed, not simply to secure directors and stockholders for past indebtedness, but to induce them to procure a renewal or extension of paper of the company then maturing or about to mature, and also to obtain further advances of credit." (In the case at bar future advances, not of credit, but of large sums of money.) "Will it be doubted that, if this mortgage had been given to the holders of these notes, it would have been valid? Are creditors who are neither stockholders or directors, but strangers to the corporation, disabled from taking security from the corporation by reason of the fact that upon the paper they hold there is also the indorsement of certain of the directors and stockholders? Must, as a matter of law, such creditors be content to share equally with the other creditors of the corporation, because, forsooth, they have also the guaranty of some of the directors or stockholders, whose guaranty may or may not be worth anything? But even that is not this case, for here the corporation is a going concern, and intending to continue its business, and the mortgage was given with a view of enabling it to so continue, and to prevent creditors whose debts were maturing from invoking the aid of the courts to put a stop thereto. Can it be that if, at any given time in the history of a corporation engaged in business, the market value of its property is in fact less than the amount of its indebtedness, the directors, no matter what they believe as to such value, or what their expectations as to the success of the business, act at their own peril in taking to themselves indemnity for the further use of their credit in behalf of the corporation? Is it a duty resting upon them to immediately stop business and close up the affairs of the corporation? Surely, a doctrine like that would stand in the way of development of almost any new enterprise. * * * Of course, an underlying fact,

expressly stated to have existed in these transactions, is good faith. Carrying on business after the giving of an indemnifying mortgage, with a knowledge of insolvency, with the expectation of soon winding up the affairs of the corporation, and only for the sake of giving an appearance of good faith, leaves the transaction precisely as though the mortgage was executed at the moment of distribution, and with a view of a personal preference. Again, not only was the corporation a going concern, not only did the directors expect and intend that it should continue, and believe that its continuance would bring financial success, but, as appears, they did continue the business for two months, and during that time paid out in the ordinary management of its affairs and in discharge of its debts over $30,000, without appropriating a single dollar to the payment of the claims for the endorsement of which they had taken this indemnity."

Notwithstanding the peculiar embarrassment resulting from the fact that the mortgage under consideration in the case above quoted from was made directly to the directors of the corporation, the opinion of the court seems to us to be very applicable to the facts before the court upon this appeal. The corporation defendant was a going concern, its stockholders, officers and creditors expected that the continuance of its business would be profitable, and that out of the profits reasonably anticipated to accrue from the prosecution of its business it would be enabled to meet all of its obligations. In the continuance of that business it relied, and—as the result proved—with good grounds, upon the pecuniary assistance of appellee. During all this time, and until the fact had become established that, notwithstanding the expectations of all persons interested, and notwithstanding the fact that appellee had faithfully kept and performed every obligation imposed upon him by the terms of the mortgage, and had backed the opinion of the stockholders and officers of the corporation and of himself, by

the expenditure of large sums of money, the business of the corporation was not profitable, no one challenged the validity of the mortgage in question. It would have been strange, indeed, if its validity had then been questioned, for, so far as appears from any claim made by appellant, the only indebtedness owed by the defendant corporation to any other person than appellee was the comparatively insignificant sum of $1000 owed to appellant's assignor. The mortgage in question was not made secretly; it was recorded as required by the statutes of the state, and it seems clear that appellant, during all of the period of six months intervening between the making of the mortgage and his attack upon it, had not only constructive but actual knowledge of all of the facts. The allegations of the intervening complaint are so framed as to irresistibly lead to the conclusion that appellant had full knowledge of all of the dealings between the defendant corporation and appellee, and expected to reap an advantage from the pecuniary help extended by appellee to the corporation. Not the slightest imputation of collusion, fraud or even legal bad faith is made. The intervening complaint, attempted to be so framed as to bring its allegations within the rules announced by the Supreme Court of the State of Washington, utterly fails to state a case in any wise similar to the facts of any case decided by that court.

Should we concede that appellant, in his intervening complaint, has succeeded in his obvious intent to state a case within the language employed by the supreme court of the state used in justifying its decisions in particular cases, it is clear that the case so stated is not similar to any case decided by that court. Decisions of courts are valuable as authority only as applied to the facts before them. The most careful consideration of the decisions of the Supreme Court of the State of Washington upon the question of the effect of mortgages made by corporations, even from appellant's standpoint, could not

lead to an irresistible conclusion that upon the record before this court the state court would hold the mortgage of May 11th, 1900, to be an unlawful preference. A brief review of these decisions may be of aid to the court.

The case of *Thompson vs. Huron Lumber Co.*, 4 Wash., 600, has been above referred to. The trust fund doctrine was there held to apply, by reason of the facts found, viz.: that the indebtedness evidenced by the notes was long overdue, the directors of the company could not agree, the business was practically stopped, the corporation was insolvent, and the mortgage was intended to act as a shield between the corporation and its other creditors.

The allegations of appellant's complaint fail to meet the facts of the Huron case in the three most important points, viz.: it is not alleged that the mortgage was given entirely to secure a past indebtedness, or that the business of the corporation was stopped or that it had ceased to be a going concern, or that the mortgage was intended to hinder and delay other creditors.

The case of *Leslie vs. Wilshire*, 6 Wash., 282, clearly supports our contention that the decisions of the Washington court are not based upon a construction of constitutional or statutory provisions, but entirely upon the application of the trust fund doctrine to the facts of the particular cases decided. In the last cited case, a corporation which was, as found by the Supreme Court, embarrassed to some extent, and had not enough money on hand to pay all of its indebtedness, executed a chattel mortgage upon its property. The court held the mortgage valid against other creditors, for the reason that notwithstanding the embarrassed condition of the corporation and its inability to pay its indebtedness, its business was regarded as a profitable one, and the evident purpose at the time of the making of the mortgage was to continue the business; and that the mortgage

was made for the purpose of enabling the corporation to continue in business.

The case of *Vincent vs. Snoqualmie Mill Co.*, 7 Wash., 566, also supports such contention. In that case the court, while saying that it was not clearly apparent that the corporation was insolvent at the time the mortgage in question was made, yet it was then being pressed by its creditors and was unable to pay them at that time, and it was doubtful whether the general market value of its property equaled the amount of its indebtedness. The corporation had ceased to operate its property prior to giving the mortgage, and surrendered the possession of its property to the mortgagee, intending to continue its business through the mortgagee in the way of operating its mill. These facts make a stronger showing of actual insolvency than the allegations of appellant's complaint. But the court sustained the mortgage upon the grounds that it appeared to be the evident desire of the corporation to continue in business and to get the matters of the corporation in better shape by getting the title to the property which it was operating in its own hands.

In the case of *Klosterman vs. Mason County Central R. R. Co., et al.*, 8 Wash., 281, the corporation had a mortgage indebtedness of some fifty thousand dollars. In addition to its mortgage indebtedness, it owed one Mason ten thousand dollars for past advances. Mason was liable as a surety upon the mortgage indebtedness. In consideration of the payment by Mason of the mortgage indebtedness and the release of the corporation's indebtedness to him, and the payment by him to the corporation of twelve hundred dollars, the corporation sold and conveyed to Mason practically all the property then owned by it. At this time, the court say, that according to the evidence, the entire property had so depreciated in value that it was not worth more than the amount of the mortgage indebtedness, even if it could have been sold in the market at all. At the time of

the conveyance the corporation was indebted to other persons. The validity of the conveyance to Mason was attacked by one of these creditors. In passing upon the contention of the attacking creditor, that the conveyance was void for the reason that the property of the corporation was a trust fund for the payment of all of the company's debts, the court said (p. 285):

"Conceding that the property of an insolvent corporation is a trust fund for the payment of its debts, and that under such circumstances such corporation cannot ordinarily prefer one creditor over another, does it necessarily follow that the transaction under consideration was void as to unsecured creditors? The answer to this question depends largely upon the power of corporations in this state to manage and dispose of their property. That power is expressed in the statute in this language: 'To purchase, hold, mortgage, sell and convey real and personal property.' From this comprehensive provision it will be seen that the appellant corporation had a right, in the proper conduct of its business, to mortgage its property to secure its debts. And this being so, it had a right to sell, in good faith, any or all of its property in payment of its mortgage liens."

And again at page 288:

"This case is easily distinguishable from Thompson vs. Huron Lumber Co., 4 Wash., 600 (30 Pac., 742), in which this court set aside a fraudulent and preferential mortgage."

It is to be noted that the conveyance to Mason was made not only in satisfaction of the mortgage indebtedness, but in satisfaction of the unsecured indebtedness to Mason. As to this indebtedness Mason stood upon the same footing as the attacking creditor, and if the law of the state of Washington was settled, as claimed by appellant, the court would have been compelled to hold that the conveyance was intended to give an unlawful preference.

In the case of *Roberts vs. the Washington Nat. Bank*, 11 Wash., p. 550, the right of an insolvent corporation to mortgage its property as security for a present advance of money for use in its business is clearly recognized, and such a preference upheld. In the opinion in this case the court distinguishes such preferences, made in consideration of a present advance, from those made wholly in consideration of antecedent indebtedness.

In the case of *Conover vs. Hull*, 10 Wash., 673, the court found that there existed actual fraudulent collusion between the creditors claiming preferences under judgments and the officers of an insolvent corporation, in fraud of the rights of its other creditors. The court, in deciding the case, review at considerable length its former rulings on the question of preferences by insolvent corporations, and the opinion of the court is valuable here chiefly as showing that the question has been always considered and decided by the court with reference only to the trust fund doctrine.

In the case of *Compton vs. Schwabacher Bros. & Co.*, 15 Wash., 306, the preference was claimed under a judgment confessed by a hopelessly insolvent corporation for an antecedent indebtedness, and under circumstances showing, in the opinion of the court, fraudulent collusion between the creditor and the officers of the corporation. In the opinion in this case the court again assert that its decisions regarding such preference rest upon the trust fund doctrine and not upon the application of any statute law. At page 312 the court say:

"Whatever rule may prevail elsewhere, it is now well settled in this state that the assets of an insolvent corporation constitute a trust fund for the benefit of all of its creditors. * * * It is wholly inconsistent with the trust fund theory to permit a race of vigilance to be instituted between the creditors of an insolvent corporation. As between them 'equality is equity.'"

In the case of *Biddle Purchasing Co. vs. Port Townsend*

Steel Wire Nail Co., 16 Wash., 681, the reasons for the decision are clearly stated by the court at page 693:

"The mortgage itself was clearly a preference by an insolvent corporation of one of its creditors. It was executed as security for an antecedent debt. Such a preference cannot be maintained."

In the case of *Cook vs. Moody*, 18 Wash., 114, it was found by the court that the corporation was insolvent at the time it gave the mortgage in question, and further found that no fraud was intended by either party. At page 116 the court say:

"The mere belief that the company might be able to continue its business and pay off its other indebtedness could not alter the legal status of the property and entitle these antecedent debts attempted to be secured by the mortgage to a preference payment, in view of the fact that the respondent's action was promptly commenced after the foreclosure. Had there been an unreasonable delay in this, another question might be presented. As it is, there is nothing in the case to take it out of the general rule, holding such property a trust fund for the benefit of all the creditors, adopted in the numerous cases heretofore decided by us."

In the case of *Washington Mill Co. v. Sprague Lumber Co.*, 19 Wash., 165, the mortgages in question were given by an insolvent corporation to secure individual debts of some of its stockholders. The court clearly recognizes the right of a corporation to mortgage its property for purposes for which the corporation was created, but holds that this corporation had no power under any circumstances to make the mortgages in question.

Van Brocklin vs. Printing Co., 19 Wash., 552. The mortgage was given by an insolvent corporation for the purpose of securing an antecedent indebtedness.

Likewise, in *Carroll vs. Pacific Nat. Bank,* 19 Wash., 639, the transfer of property which was held void was made by an insolvent corporation, known by the creditor to be insolvent, in payment of an antecedent indebtedness.

Likewise, in *Burrell vs. Bennett,* 20 Wash., 644, collateral security was given by an insolvent corporation to a creditor having knowledge of the insolvency to secure an antecedent indebtedness.

If we are right in our understanding of the Washington decisions, then, regardless of the argument that the decisions of the state court have not been based upon a construction of constitutional or statutory law, appellant's contention fails, and his appeal must depend upon the construction of the principles of equity jurisprudence affecting such preferences announced by the courts of the United States. The decisions of the federal courts upon this question are clear, decisive and harmonious. As before pointed out, in the only federal case relied upon by appellant, the Supreme Court of the United States was very careful to declare that the theory of the trust fund doctrine announced by the state court could not be maintained upon general principles of equity jurisprudence. It is not our intention to attempt, in this brief, to make an exhaustive analysis of the decisions of the state and federal courts upon this proposition. It seems that the doctrine originated in the statement of the proposition that the property of a corporation must first be appropriated to the payment of its debts before any portion of it could be distributed to its stockholders.

In the case of *Fogg vs. Blair,* 10 Sup. Court Rep., 338 (133 U. S., 534), this rule is very emphatically stated. After stating the facts, and without making any distinction between railroad or other corporations, the court said:

"It (the trust fund doctrine) does not mean that the property is so affected by the indebtedness of the company that it

cannot be sold, transferred or mortgaged to *bona fide* purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence."

In *Wabash, &c., Ry. Co. vs. Ham,* 114 U. S., 587, the court said (p. 394):

"The property of a corporation is doubtless trust funds for the payment of its debts, in the sense that when the corporation is lawfully dissolved, and all its business wound up, or when it is insolvent, all its creditors are entitled, in equity, to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true, in the case of a corporation, as in that of a natural person, that any conveyance of property of the debtor, without authority of law, and in fraud of existing creditors, is void as against them."

In the case of *Hollins, et al., vs. Brierfield Coal & Iron Co.,* 14 Sup. Court Rep., 127 (150 U. S., 371), the court, after careful consideration of the trust fund doctrine as asserted in that case, said:

"A party may deal with a corporation, in respect to its property, in the same manner as with an individual owner, and with no greater danger of being held to have received into his possession property burdened with a trust or lien. The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to account for fraud, or sometimes even mere mismanagement, in respect thereof; but, as between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, or in any other sense than does an individual debtor. That is certainly the general rule, and, if there be any exceptions thereto, they are not presented by any of the facts in this case. *Neither the insolvency of the corporation*

nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions, nor all together, gave to these simple contract creditors any lien upon the property of the corporation, nor charged any direct trust thereon." (The italics are ours.)

In the case of *Gould vs. Little Rock M. R. & T. Ry. Co.*, 52 Fed., 680, the court, after referring to the decisions of the Supreme Court of Arkansas sustaining the right of a corporation in failing circumstances to make preferences among its creditors, says:

"The established rule in that state is in harmony with the general, though not quite uniform, current of authorities in this country on the question. * * * The cases which hold the contrary doctrine are bottomed on the erroneous theory that the insolvency of a corporation, in effect, dissolves it, and makes the directors mere trustees to distribute its assets ratably among its creditors. It is undoubtedly true that the property of a corporation is, in one sense, a trust fund for the payment of its debts, but this rule means no more than that the property of a corporation cannot be distributed among its stockholders or applied to any purpose foreign to the legitimate business of the corporation, until its debts are paid. The rule, so far as it relates to payment of debts, is specific whenever the property of a corporation is applied to the payment of any of its *bona fide* debts. The rule, as has been before pointed out, does not prevent a corporation, when solvent or insolvent, from making preferences among its creditors and exercising in good faith absolute dominion over its property in the conduct of its legitimate corporate business, so long as its right to do so is not restrained by statute or judicial proceedings.

The case of *Sanford Fork & Tool Co. vs. Howe*, 157 U. S., 312, has been before referred to. The opinion of the court in

that case seems to meet and effectually answer every allegation relied upon by appellant.

In the case of *Doe vs. Northwestern Coal & Transportation Co.,* 78 Fed., 62, Judge Gilbert, in rendering the decision of the court, after considering other questions raised by the appeal, said (p. 71):

"It is contended that the mortgage of the defendant J. Whalley is invalid, for the reason that at the time it was executed the corporation was insolvent, to his knowledge, and that to permit it under those circumstances to prefer one creditor to others would be to disregard the well-established rule of equity that the property of an insolvent corporation is a trust fund to be held for the equal benefit of all its creditors. There are decisions that uphold this view of the rule, but it is not so held in the Federal courts."

In the case of *Armstrong vs. Chemical National Bank,* 41 Fed., 234, the court considered a preference made by a national banking corporation, which preference was claimed to be void under the provisions of section 5242 of the Revised Statutes of the United States, which prohibits all transfers by any national banking association made after the commission of an act of insolvency, or in contemplation thereof, with a view to the preference of one creditor to another. The court say (p. 238):

"The statute is directed to a preference, not to the giving of security when a debt is created; and if the transaction be free from fraud in fact, and is intended merely to adequately protect a loan made at the time, the creditor can retain property transferred to secure such loan until the debt is paid, even though the debtor is insolvent, and the creditor has reason at the time to believe that to be the fact."

As before pointed out, it is not claimed that complainant had any knowledge, actual or constructive, of the condition in

which appellant charges the corporation's affairs to have been at the time the mortgage was made. There is not the slightest showing of fraud or bad faith, actual or legal. It is clear that the money advanced by complainant to the corporation, at and prior to the giving of the mortgage, and the money advanced subsequent to the giving of the mortgage, were intended to be used, and were in fact used in the prosecution of the corporation's business. No part of any of the advances were repaid, and the corporation retained all of the money loaned to it by complainant for the benefit of its stockholders and creditors.

In the case of *Gould vs. Little Rock, &c., Co., supra,* the court say (52 Fed., 686):

"The attack upon the validity of the trust deed must fail upon another ground. Treating the directors as trustees, it is not open to the company, or any of its creditors, to avoid the security given in pursuance of the direction of the stockholders, as well as the directors, so long as the company retains the money which was loaned in good faith, and actually appropriated to legitimate corporate purposes. The payment of the debt thus contracted is an essential pre-requisite to the avoidance of the deed of trust given to secure its payment. 'And,' in the language of the Court of Appeals of New York, 'this is true whether the pledge was taken for a present or precedent debt. In either case the equity to be regarded equally exists.'"

It seems clear to us that the judgment of the lower court must be sustained. Appellant's whole contention must fail unless the court sustains his claim that the decisions of the Supreme Court of the State of Washington upon this subject are binding and controlling upon the federal courts. The rule established by very numerous decisions of the federal courts is that those courts adopt and follow the decisions of state courts in questions which concern the constitutional laws of the state, but do

not follow state decisions on questions of general or commercial law.

We think we have clearly shown that the Washington decisions are not based on any constitutional or statutory provisions, and further, that the Washington court has not claimed to have considered any such provision. But even if the court should not agree with us in this contention, appellant must still fail, for no decision of the Washington court holds that a mortgage made under the circumstances surrounding the making of this mortgage is invalid. Even should the court believe that this position is not sound, we are certainly right in saying that it cannot be positively said that if this case were before the Washington court the mortgage would be held invalid.

But we respectfully submit that the judgment of the lower court must be affirmed upon another ground. It is contended by appellant that the corporation was insolvent, and that, therefore, a court of equity, upon a proper application, should take charge of the corporation's property, wind up its affairs and convert its assets into money, and make an equal and ratable distribution thereof amongst all of its creditors, disregarding any preference attempted to be given after the corporation became insolvent.

Since the decision of all of the cases cited by appellant or appellees on this appeal, the United States Bankruptcy Act of 1898 has gone into effect. This act covers the whole field of insolvency or bankruptcy, and prescribes an exclusive system for the control of the assets of bankrupts, the determination of preferences claimed against bankrupts, and the winding up of the affairs and business of bankrupts, and the distribution of their property amongst their creditors. By the terms of this act it is provided, in substance, that the transfer by any person (or corporation) of any portion of his (or its) property to one or more of his (or its) creditors, with intent to prefer such creditors over his (or its) other creditors, if made while the person (or corporation) is insolvent, is an act of bankruptcy, and that a petition may be filed against the person (or corporation) who is insolvent and who has committed such act of bankruptcy within four months after the recording or registering of such transfer.

The Bankruptcy Act of 1867 described certain acts of bankruptcy, and provided that the petition might be brought within, in some cases, four, and in others six months, after the act of bankruptcy should have been committed.

The provisions of the two acts are so similar in principle and effect that the construction given to this provision of the

act of 1867 by the federal courts is applicable to the similar provision of the present law.

In the case of *Bean vs. Brookmire* (1 Dillon, 125), 2 Fed. Cas., 1127, Fed. Cas. No. 1168, the court construed the provision of the act of 1867 relating to preferences. The court say:

"The language of the section is, that if any person, being insolvent, or in contemplation of insolvency, within four months of the filing of the petition by or against him, with a view to giving the creditor preference by any of the acts therein mentioned, the act shall be void, and the assignee may recover the property from the person receiving it, if such person had reasonable cause to believe the party insolvent. It is very certain that the act described is not made void by this clause, or by any clause in this section, unless it was done within four months of the filing of the petition by or against the bankrupt, and it is as strong an instance as can well grow out of a negative pregnant that no such act is void for any of the causes there mentioned that was done within the four months."

After discussing the standing of preferences made by insolvents under the common law of the different states, Mr. Justice Miller says:

"The careful and diligent framers of the bankrupt act were fully aware of all that has just been said. But they were about to frame a system of laws, one important feature of which was to provide for the distribution of the property of an insolvent debtor among his creditors, and they adopted wisely, as the general and prevailing rule of distribution, equality among creditors. But they found that this general principle could not without hardship be made of universal application. When a creditor had obtained by fair means a lien upon any property of the bankrupt, that lien ought to be respected. If he had so obtained the payment of the whole or a part of his debt, the payment ought to stand. These exceptions to the general rule

of distribution were, however, liable to be abused, and might be used to defeat the purposes of the bankrupt law. The bankrupt, knowing that he himself would soon be helpless, would desire to pay or secure favorite creditors. They, knowing his liability to pay, and his liability to be called into a bankruptcy court, would naturally desire to secure themselves at the expense of other creditors. In this dilemma, Congress said we cannot prescribe any rule by which a preference would be held to be morally right or wrong; and it would be fatal to the administration of the law of distribution to permit such a question to be raised. We will therefore adopt a conventional rule to determine the validity of these preferences. In all cases where an insolvent pays or secures a creditor to the exclusion of others, and that creditor is aware that he is so when he receives it, he shall run the risk of the debtor's continuance in business for four months. If the law which requires equal distribution, is not called into action for four months, the transaction, if otherwise honest, would stand; but if by the debtor himself, or any of his creditors, that law is invoked within four months, the transaction shall not stand, but the money or property received by the party shall become a part of the common fund for distribution. * * * The thirty-fifth section and the thirty-ninth section, having for the first time set up a rule by which certain payments and transfers of property shall be declared void (a rule at variance with the common law, and with the statutes of the states), very properly limits and defines the circumstances within which this new rule shall operate. These are, among others, * * * and that the transaction must have been recent when the bankrupt law was applied to the case—with a creditor within four months and with the general purchaser within six months."

In *Harvey vs. Crane* (2 Bissell, 496), Fed. Cas. No. 6178, 11 Fed. Cas., 734, the court said:

"A creditor may obtain a preference from an insolvent debtor with knowledge of the insolvency, if within the limitation prescribed by the law, but the possession must be obtained by a complete act within the limitation."

In *Collins vs. Gray* (8 Blatchf., 483), 6 Fed. Cas., 129, Fed. Cas. No. 3013, the transfers in question were made by the bankrupt to his father. After discussing the facts, the court say:

"Taking the transaction as a giving of preference to the father as a creditor, while the debtor was insolvent, or in contemplation of insolvency, and assuming that the father had reasonable cause to believe that his son was insolvent, the case exhibits no features but those described in the first clause of section thirty-five of the bankruptcy act. By that clause, if such a transaction be made within four months before the filing of the petition whereon the debtor is declared bankrupt, the same is declared void, but not otherwise. Although the bankrupt law aims at an equal distribution of all the property of a debtor among his creditors from the time he becomes insolvent or contemplates insolvency, and is intended to disallow preferences given by a debtor to favored creditors, it goes no further, when preference alone is the subject of complaint, then to avoid such as are given within four months before the filing of the petition. If, in all other respects, the transfer is free from fraud or illegality, the law allows no attack to be made upon it after four months have elapsed."

In *Potter vs. Coggeshall,* 19 Fed. Cas., 1138, Fed Cas. No. 11,322, this question is very fully discussed. The court say:

"The answer of the petitioners to these allegations is twofold. The first is, that assuming the allegation of the fact to be true, the trustee is estopped from impeaching the transaction, because the proceedings in bankruptcy against Dow were not commenced until six months (less one day) after the act

of preference—and not within four months, as expressly required by the first clause of section thirty-five of the bankruptcy act. After the lapse of four months, say they, the preferences—simply preferences which an insolvent debtor may have made, are to be held valid as against all the world, so far as the preferred creditor is concerned. And this, in my judgment, is a sufficient answer."

It is firmly established that all state laws relating to the subject-matter of the federal bankrupt statute are suspended or superseded during the existence of the federal law, even as between citizens of the same state.

In *May vs. Breed,* 7 Cush., 40, the court says: "When a uniform system of bankruptcy under a law of the United States is actually in force, to the extent to which it reaches, it must of necessity suspend state laws, because they would be repugnant."

In *Clarke vs. Rosenda,* 5 Rob. (La.), 33, the court said, discussing the effect of the general bankrupt act of 1841:

"I cannot imagine a more ample investment of jurisdiction than Congress has conferred on the circuit and district courts of the United States; and the extent of the jurisdiction proves that the national legislature, whilst exercising its constitutional power to establish a uniform system of bankruptcy, intended to suspend, if not sweep out of existence, the insolvent laws of the states and the jurisdiction of their tribunals, with ample powers where justice should be administered alike to all, and a general system formed and controlled by a body of judges deriving their authority from the same power that made the law."

In *Thornhill vs. Bank of Louisiana* (1 Woods, 1), 23 Fed. Cas., 1139, Fed. Case No. 13,992, the court said, after quoting from the cases last above cited:

"The Bank of Louisiana is, according to the agreed statement of facts, an insolvent moneyed corporation. Such a corporate body falls within the purview of the general bankrupt law of the United States, and according to the authorities cited, a state law applicable to a like case is in effect suspended by the law of congress. I am of the opinion, therefore, that on the taking effect of the general bankrupt law on June 1, 1867, the law of the state of Louisiana, approved March 14, 1842, providing for the liquidation of banks, was suspended; that the state courts had no jurisdiction to proceed under it, &c., &c."

To the same effect see also

In re Reynolds, 20 Fed. Cas., 612, Fed Cas. No. 11,723.

It is not necessary, in order to suspend the operation of state insolvency laws, that proceedings under the federal bankruptcy act should be instituted.

Ex parte Ames, Vol. 8, Fed. Cas., p. 236; Fed. Cas. No. 4237.

In so far as a state law attempts to administer on the effects of an insolvent debtor and distribute them among creditors, it is to all intents and purposes an insolvent law, although it may not authorize a discharge of the debtor from further liability.

In re Merchants' Ins. Co., 3 Bissell, 162.

In this case Judge Blodgett said (p. 164):

"The object and intent of the general bankrupt law is to place the administration of the affairs of insolvent persons and corporations exclusively under the jurisdiction of the federal courts sitting as courts of bankruptcy, and the enactment of the general bankrupt law now in force suspended all actions and proceedings under state insolvent laws."

And at page 166:

"It also seems clear to us that in so far as a state law attempts to administer on the effects of an insolvent debtor and distribute them among creditors, it is to all intents and purposes an insolvent law, although it may not authorize a discharge of the debtor from further liability on its debts."

In *Blake, Moffitt & Towne vs. Francis-Valentine Co.*, 89 Fed., 691, application was made to the district court of the northern district of California for an injunction to prevent the sale of property of the defendant corporation under an execution issued out of the state court in an action brought by the Donohoe-Kelley Banking Company. At the time the application was made, the Bankruptcy Act of 1898 was in full force and effect, but four months had not elapsed from the date of its passage and therefore no proceedings whatever could be had under it. Nevertheless, the court held that the defendant corporation had, while insolvent, permitted the Donohoe-Kelley Company to obtain by an attachment a preference through legal proceedings, and the court held that therefore the injunction should issue and the sale be prevented, in order that the defendant's property might be preserved until the time should arrive when the remedy afforded by the statute could be resorted to.

In the opinion of Mr. Justice Hawley, at page 694, it is said:

"Upon the interpretation of the act, upon reason and authority, I am of opinion that from the date of the passage of the act, the relation of debtor and creditor, and of one creditor with all other creditors, are to be governed by the provisions of the law enacted on July 1st, 1898."

The mortgage attacked by appellant in his intervening complaint was recorded on the 14th day of May, 1900. Appellant's

intervening complaint was filed in the lower court December 31st, 1900, seven months and seventeen days after the recording of the mortgage. If at that time appellant had filed a petition against the corporation charging the execution, delivery and recording of this mortgage as an act of insolvency, the petition would have been upon proper proceedings dismissed. If at any time after September 14, 1900, a petition in bankruptcy had been filed by the corporation or any creditor upon sufficient grounds, and an assignee appointed, and that assignee had brought an action to set aside this mortgage, his action would have failed.

Even if we should concede, as we do not, that the allegations of the appellant's intervening complaint bring the mortgage of May 11th, 1900, within the provisions of the bankruptcy act, the lapse of four months after the recording of the mortgage without any attack being made upon its validity upon the ground that it was an unlawful preference, made the mortgage entirely valid against all persons.

Under the trust fund doctrine contended for by appellant, a different rule was applied by some state courts to preferences made in good faith by insolvent corporations than was applicable to like preferences made by insolvent individuals. The correctness of this doctrine was never conceded by the federal courts. Having clearly before it the conflicts between the decisions, not only of the courts of the different states but between the courts of some of the states and the federal courts, Congress in its wisdom saw fit to place all insolvent debtors, as well corporations as individuals, upon an equal footing as regards the question of preferences, and to establish a conventional rule by which the validity of preferences made by any insolvent should be decided. As pointed out by the courts in construing the act of 1867, no attempt was made to prescribe any rule by which a

preference would be held to be morally right or wrong. The rule, while a conventional one, seems to be founded in good commercial reason. If a debtor, being insolvent and having publicly preferred one creditor to the exclusion of all others, is permitted by his general creditors to continue in the possession and control of his property and business for a period of four months after giving the preference, it seems reasonable to hold that the general creditors have acquiesced in the giving of the preference, and by such acquiescence have made valid and unassailable the preference which, in the interim, might have been successfully assailed. It is clear that in any bankruptcy proceedings, an attack upon the mortgage in question, made more than four months after it was recorded, would be fruitless; that being so, can it be held that an attack such as is attempted by appellant, made after the lapse of such time, can be sustained?

An assignee appointed under the law expressly enacted for the control and disposition of the property of bankrupts, appointed under a petition filed more than four months after the recording of the mortgage, could not maintain an action to set aside the preference.

Can a judgment creditor who has refused, and still refuses to invoke the aid of the bankruptcy courts, successfully maintain such an attack after the lapse of such period of time?

It has been before pointed out that no question of collusion, fraud or bad faith is attempted to be raised by appellant's complaint. His case is grounded wholly upon the alleged insolvency of the corporation existing without the knowledge of complainant. It is purely a question of a morally rightful preference made in good faith to a *bona fide* creditor receiving it in good faith to secure the repayment of moneys loaned for use, and actually used, in the prosecution of the corporation's business, both before and after the execution of the mortgage. The valid-

ity or invalidity of such a mortgage must be determined by reference to the United States bankruptcy act. Under the provisions of that act the attack comes too late. It is not required by the provisions of the bankruptcy act that knowledge of the making of a preference by an insolvent must be brought home to the general creditors in order to set the four months period running. The recording of the mortgage imports notice. It, however, may not be amiss to point out the fact that appellant's solicitors are also the solicitors for the defendant corporation.

The federal bankrupt law, viewed as operating on the rights of creditors, is a system of remedy. As said by Mr. Brandenburg: "It takes out of the hands of the creditors the ordinary remedial processes, and suspends the ordinary rights which by law belong to creditors and substitutes in their place a new and comprehensive remedy designed for the common benefit of all."

As we understand it, one of the chief objects of the act is to establish a system of dealing with the estates of insolvent debtors which shall be uniform throughout all of the states of the Union, and to vest the administration of that system in the federal courts. It would seem to irresistibly follow that all questions relating to the validity of preferences given by insolvents, and to the form and timeliness of attacks upon such preferences, must be decided by reference to the bankruptcy act. A system under which, in the federal courts, an attack upon a mortgage in one form more than four months after it was recorded, would fail, and a like attack, but made in a different form in the same court after such lapse of time, would succeed, could hardly be called uniform.

In conclusion we respectfully submit,—

First. That the motion to dismiss this appeal should be granted, with costs to appellees.

Second. That should the court find the motion to dismiss the appeal to be not well taken, the judgment of the lower court sustaining the demurrer to appellant's intervening complaint should be sustained, with costs to appellees.

Respectfully submitted,

HAROLD PRESTON,
E. M. CARR,
L. C. GILMAN,

Solicitors for Appellees Henry F. Allen and John H. McGraw, as Receiver.

E. M. CARR, Counsel.

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

F. W. COLER, *Appellant,*

vs.

HENRY F. ALLEN, JOHN H. McGRAW, as Receiver, and PACIFIC NORTHWEST PACKING COMPANY (a corporation) and THE PACIFIC NORTHWEST PACKING COMPANY (a corporation), *Appellees.*

No. 713

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF WASHINGTON, NORTHERN DIVISION.

REPLY BRIEF ON THE MERITS

FREDERICK BAUSMAN,
DANIEL KELLEHER,
Solicitors for Appellant.

LOWMAN & HANFORD & A. P. CO., SEATTLE

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

F. W. COLER, *Appellant*, vs. HENRY F. ALLEN, JOHN H. McGRAW, as Receiver, and PACIFIC NORTHWEST PACKING COMPANY (a corporation), and THE PACIFIC NORTHWEST PACKING COMPANY (a corporation), *Appellees.*	No. 713

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF WASHINGTON, NORTHERN DIVISION.

REPLY BRIEF ON THE MERITS.

REPLY ON MERITS.

Appellees' brief attempts to sustain the lower court against the intervenor on three grounds. *First,* The State Supreme Court would not pronounce this mortgage void on such allegations as ours, that is to say, it has not gone so far against

corporate preferences as we say it has. *Second,* That, even if it has gone so far as we say, it has done so not as interpretation of local law, but only as a kind of local policy which the federal courts are not bound to follow. *Third,* The national bankruptcy act renders this State doctrine a thing of the past.

FIRST

If the State Supreme Court would hold this mortgage void against its own citizens as a local rule of policy or property, then the federal courts, under the rule in *Purifier Co. v. McGroarty,* would have to apply it as to citizens of other states. That is clear. Now, what would the State Supreme Court decide here? Would that court sustain a demurrer to this intervention of ours? We say emphatically, No. Appellee Allen, however, sees two distinctions of fact between the State cases and this—the corporations there had ceased to be going concerns, and, actual fraud was the basis of those decisions.

Let us examine and see. The first case was *Thompson v. Huron Lumber Co.,* 4 Wash., 600. That company *was a going concern* at the time of and after the mortgage. "The Company * * * continued its business in every respect in the same manner as it had done prior to the execution of the said mortgage," etc. (p. 601 of that case). The Huron Company was manifestly in the position of the Packing Company here, still going, but getting more and more in debt, "was merely using up its property without profit over working expenses" (p. 604 of that case).

This effectually disposes of the contention that the State courts would not hold void a preference by a corporation still going.

But, it is argued, there is another distinction between the *Huron* case and this, and for that reason the local courts would

not hold this Packing Company's preference void. The *Huron* case was based upon actual fraud and conspiracy. Was it? Let us see what the court says, at page 609, on a petition for rehearing, which complained that there was no good reason for holding that the mortgagee, the preferred bank, was acting in concert with the company.

"We view this point as immaterial. * * * It seems to be taken by counsel that we have insinuated some sort of conspiracy to hinder and delay the creditors between its officers and the bank, but it is not so."

Again, on page 601, the Court says, of the bank's remonstrance against an alleged finding of fact that it had actually consented to the Huron Company's course of action after or before the mortgage, "without reviewing the testimony it may be conceded that there is no such showing. The terms of the instrument they drew make a hindrance and delay *legally* certain."

Thus the two distinctions attempted by appellee here between the leading *Huron* case and this are utterly incorrect. Now, in all other respects the parallel is so striking as not to be avoided without positive ingenuity. The other side have appealed to their bill as proper to be considered here. Very good. The Packing Company, like the Huron, continued in business (32) after the mortgage, and applied its proceeds so far as the complaint shows, to current business rather than on the mortgage, thus constituting as in the *Huron* case, a legal, even if unintentional, "shield between the corporation and its other creditors, while it prosecuted its ordinary business for an indefinite length of time." The mortgage here was even more of a shield. Not only did the mortgagor continue in business leaving taxes and insurance unpaid (30-1), but the lien was to include future advances (20), thus completely putting the packing company's assets indefinitely in the control of this

mortgagee while he suffered it to continue business (as we allege, insolvent) and postpone debts already incurred.

It seems preposterous to argue that under the authority of the *Huron* case the State courts would not be bound to hold this mortgage void against creditors. The facts are extraordinarily similar. Now, on those facts what was the rule announced in the leading case?

"When it has reached a point where its debts are equal to or greater than its property, and it cannot pay in the ordinary course, and its business is no longer profitable, it ought to be wound up and its assets distributed." (*Huron* case, p. 603.)

That was the rule as first announced in 1892. In 1901 the same court in *Strohl v. Seattle Nat'l Bank,* 64 Pac. at 918, says:

"In the case of *Thompson v. Huron Lumber Co., supra,* the court uses this language [repeating it exactly as quoted above]. Such conditions are not shown to have existed in *this* case when the mortgage was made."

Is this not saying, in their very last utterance on this point, that, if such conditions did exist, the mortgage would be void? There can be but one answer. Now, what did we say in our intervention? (55). The Packing Company

"was [insolvent] at all times in the month of May, 1900, and at the time of the giving the mortgage to complainant Allen as set out in paragraph VI of complainant's bill of complaint. That at the time of giving this mortgage the defendant The Pacific Northwest Packing Company had reached a point where [exactly following the language of the rule in the *Huron* case]."

Coler, a judgment creditor on a debt antedating the mortgage, would never be demurred out of a Washington court on an allegation like this. The *Huron* case, exactly like this, on the facts, was like this in the method of attack also, a mort-

gage in foreclosure assailed by an intervening judgment creditor.

SECOND.

It is argued that, even if the Washington cases do amount to what we say, it is not a course of decision originating in local statute and so not obligatory upon this court. But it does rest in part upon statute. The court expressly says so (*Huron* case, 605, 610). It refers to the *Rouse* case in Ohio and notes the resemblance between the statutes. It was the same *Rouse* case that the United States Supreme Court followed in *Purifier Company v. McGroarty.* It may be conceded that our court was not proceeding upon a statute altogether, that it was in part acting upon a general theory. This we may concede, for that is just what the Federal Supreme Court conceded the Ohio court was doing, when it nevertheless felt bound by their doctrine. Observe the language of the United States Supreme Court speaking of the *Rouse* case. It

"proceeded *in part* upon a theory * * * But it also proceeded in large part, as the opinion clearly shows, upon the constitution of Ohio and the laws and policy of that State," etc.

Corporations, essentially the creatures of statute, can exercise only such powers as the courts of the state enacting those statutes hold *infra vires.* Anything more perfectly local cannot be imagined. A rule of state *policy,* too, is as binding on federal courts as one of statutory construction, when not in conflict with guaranteed principles of state and federal relations. (*Hartford F. Ins. Co. v. Chicago etc. Ry,* 175 U. S. 91.)

THIRD.

State insolvency laws, it is said, are superseded by the National Bankruptcy Act. Agreed. But does counsel contend that this State rule making preferences by insolvent cor-

porations void is an insolvency or bankruptcy act? If so, they are very fully answered in

Mayer v. Hellman, 91 U. S. 496.

There it was expressly decided that an Ohio law was "not an insolvent law in any proper sense of the term," though it provided that on an assignment for the benefit of creditors his trustees should file the original in a court and enter into a bond to the State.

"It does not compel or in terms even authorize, assignments; it assumes that such instruments were conveyances previously known and only prescribes a mode by which the trust created shall be enforced. * * * It does not discharge the insolvent from arrest or imprisonment; it leaves his after-acquired property liable to his creditors precisely as though no assignment had been made."

To the same effect are

Tompkins v. Hunter, 43 N. E. 532 (N. Y.)
Ebersole v. Adams, 10 Bush 83.

It is too plain for discussion that the Washington doctrine which we invoke proceeds upon no statute regulating insolvency or attempting any such thing. All that happens is this. When a corporation here reaches a certain degree of embarrassment, a preference by it is void. When any one seeks to enforce it a creditor may intervene. The creditors must be judgment creditors (see *Huron* case), not all creditors, and among such of that sort as come in the court will distribute. There is no discharge of the debtor or any other of the provisions of a scheme of bankruptcy.

The foregoing affords a speedy answer to this position. But there is another answer. *The national bankruptcy act is not operative until it is invoked.* If not invoked it may be waived by all.

Mayer v. Hellman, supra.

It was there held that the validity of an Ohio assignment could not be questioned if the National Act was not set in motion until after the six months in which the commission of an act of bankruptcy could be assailed. The same doctrine is maintained in

Boese v. King, 108 U. S. 379.

The Supreme Court of the State of Washington has had this question before it in

Strohl v. Superior Court, 20 Wash. 545,

in which they say,

"Creditors of such corporations should have their ordinary remedies under existing State laws until such corporation is adjudged a bankrupt under the law of Congress and by the proper tribunal. Unquestionably upon such adjudication the power of the State court to further proceed ceases."

This doctrine is directly sustained by *Chandle v. Siddle,* 10 Nat'l Bank Reg. 236.

Though a particular transfer may be an act of bankruptcy it is governed by State laws until the debtor is adjudicated a bankrupt under the national act.

In Re Romanow, 92 Fed. 510.
In Re Wright, 95 Fed. at 810.
Simonson v. Sinsheimer, 95 Fed. at 952.

Finally, it is very doubtful if the condition of the Packing Company here was within the present national bankruptcy act's definition of insolvency. Under the old act failure to pay in the ordinary course was enough, but under the present, sec. 1, subd. 15, insolvency exists only when the aggregate property, exclusive of any improperly disposed of, shall not at a fair valuation be sufficient to pay the debts. The distinction between the two requirements has been often point-

ed out. Now, it is quite plain that a corporate debtor might be insolvent only to a degree contravening local policy as to any longer continuing trade, and yet not within the federal enactment. This point also your Honors will find adverted to in the Washington case just cited of *Strohl v. Superior Court.* The allegations of Coler's intervention, by which allegations the successful demurrer has to be tested, would hardly present a case under the national law.

The conveyance here complained of to Allen was executed May 11th, 1900 (16, 55). Coler's intervention was filed December 31, 1900 (58). So far as the national act was concerned, creditors had waived it; complainant Allen, too, who should have had no reason to fear, if his preference was valid, and who could safely have sought, a district court in bankruptcy to enforce his lien and distribute equally to others the surplus. But most carefully did his bill refrain from any direct allegation of insolvency. Your Honors in the previous appeal say, as to insolvency in that bill, "we think it may be *inferred.*" Having thus steered originally wide of the bankruptcy act, complainant now invokes it against us. We think, however, that he has been fully answered on this point. He cannot avail himself of it at this late day without establishing the following extreme propositions—*first,* that the Washington policy on corporate preferences is a local bankrupt act; *second,* that, since the national act, a conveyance bad under local law can be attacked only under the federal act, if sufficient, and if it be not attacked there, it cannot be attacked at all.

Respectfully submitted,

FREDERICK BAUSMAN and
DANIEL KELLEHER,
Solicitors for Appellant.

No. 713.

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

F. W. COLER,

Appellant,

vs.

HENRY F. ALLEN, JOHN H. McGRAW, as Receiver, and PACIFIC NORTHWEST PACKING COMPANY (a corporation), and THE PACIFIC NORTHWEST PACKING COMPANY (a corporation),

Appellees.

Appellant's Brief on Motion to Dismiss.

Appellant's Motion for Alias Citation.

BAUSMAN & KELLEHER,

Counsel for Appellant.

LOWMAN & HANFORD S. & P. CO., SEATTLE.

IN THE

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No. 713.

APPELLANT'S BRIEF ON MOTION TO DISMISS. APPELLANT'S MOTION FOR ALIAS CITATION.

Coler, appellant, was allowed to intervene in complainant Allen's foreclosure of two mortgages, and attacked the second (p. 55) of them as void against him, a judgment creditor of one of the mortgagor defendants. The *complainant* (and no one else) opposed the complaint in intervention and successfully demurred to it

(64-9). Thereafter the following decree (69) was entered against the intervenor:

"Wherefore, it is by the Court here and now ordered and adjudged that the complaint in intervention heretofore filed herein by F. W. Coler be, and the same is hereby, dismissed; and that complainant be not required to further answer the said complaint."

No other parties are in any way referred to in this decree. Coler, appealing from it, served citation upon complainant and the foreclosure receiver. It is now insisted that his appeal should be dismissed because he has not served his citation or otherwise impleaded in appeal the other defendants. We will accordingly examine this contention as to each of the defendants in turn.

1. *Pacific Northwest Packing Company.*

This defendant had not a shadow of interest in the controversy between Coler and complainant Allen, and for two reasons. *First*, the mortgage attacked by Coler is the *second* of the two mortgages (55). That was executed by this defendant's successor *The* Pacific Northwest Packing Company (16). There are two companies, distinguished only by the article "The" (2). *Second*, as the bill itself distinctly alleges, this defendant had, before the foreclosure, transferred all its assets, and its liabilities also, to its successor (2). The authorities are consequently clear that this defendant was an utterly unnecessary party to the appeal. (*Mills v. Provident Life & Trust Co.*, 100 Fed. 344, 9th C. C. A.) *Third*, there is now filed in this court the consent

of this defendant to the hearing of this appeal and a waiver of citation. The authorities to support this step will be cited later.

To all this it may be added, first, that this defendant never appeared in the action, and, second, that it is no way referred to in the decree against Coler, by whom, as already stated, it had been in no way attacked.

2. *THE Pacific Northwest Packing Company.*

The appeal cannot for several reasons be dismissed on account of omission to serve this defendant.

First, the decree complained of by Coler did not mention this defendant and was not against its interests, so as to afford it a right to appeal and trouble this court with a second hearing. The controversy was consequently altogether *severable* as to Coler and Allen. It was not an appeal from final foreclosure decree as in *Davis v. Mercantile Trust Co.*, a decree against the mortgagor, which it also would be presumed to be grieved with and from which it might later take an appeal to the second burden of this court.

We have not yet seen appellees' brief, but we have no doubt it will cite such cases as *Masterson v. Herndon* and *Davis v. Mercantile Co.*, and from this court, perhaps, *Illinois Trust and Savings Bank v. Kilbourne*, 76 Fed. 883. The authority of these cases is most obvious and is cheerfully conceded. Take the last mentioned. Who was appealing? One on whose property or interest a lien or claim had been impressed. The very order appealed from had impressed a lien or

trust upon many others, either in terms or by necessity. Now, every one of these others had a grievance and a right to appeal. To cut these off by citation, so as to prevent a swarm of other appeals, is so clearly necessary as not to need discussion. But who was aggrieved here? Coler only, and he alone appeals. (He got no lien on anybody's interest.) He is the only one who did or could appeal, for as to every one else the dismissal of his claim was favorable. Apply, then, the two tests on these motions to dismiss for want of parties. Is this court exposed to another appellant? Clearly not. Is the prevailing party below free to proceed against the others? Clearly, yes.

Second. This defendant also has filed a consent to the present appeal and a waiver of citation. This very just proceeding is allowed by the United States Supreme Court (*Bigler v. Waller*, 12 Wallace, pp. 142, 147). The court there says of defective citations:

"Notice is required by law, and where none is given and the failure to comply with the requirement is not waived, the appeal or writ of error must be dismissed, but the defect may be waived in various ways *as by consent or appearance* or the fraud of the other party."

And in *Richardson v. Green*, 130 U. S. 104, the court says:

"But the issuing of a citation may be waived by the appellees and a general appearance by them is a waiver."

This court's decision in *Farmers Loan & Trust Company v. Longworth*, 76 Fed. 609, is much in point.

There dismissal was moved for on the ground that two persons *clearly affected adversely* by the order appealed from by the appellant, similarly affected, had been omitted.

"Neither the Northern Pacific Railroad Company nor Andrew F. Burleigh, receiver, joined in the appeal; nor were they, or either of them, served with citation. After the appeal was perfected, and *after a motion had been filed* by the appellees *to dismiss* the same, the receiver by his attorney entered in this court his appearance and consent to the appeal."

Now, did your Honors disregard this? By no means. You gave it full effect. You did dismiss, but only because the *railroad company* had not done what the receiver had. Nay, more, a little while later, discovering that the company also had in fact filed its consent in your court, you recalled the dismissal. (*Farmers Loan & Trust Co. v. Longworth*, 83 Fed. 336).

All that this court looks to, so far as you yourselves are concerned, is that you be not troubled by second appeals on the same controversy. Anything that effectually settles this is enough. So far as the appellee is concerned, who moves to dismiss, there is plenty of good authority that he can waive the objection. In *Buckingham v. McLean*, 13 How. 151, the court observes of notice of appeal "such notice may be waived by entering a general appearance of counsel. Where an appearance is entered the objection that notice has not been given is a mere technicality, and the party availing himself of it should at the first term he appears, give notice of the motion to dismiss *and that his*

appearance is entered for that purpose." On the very day (September 4th) that the present motion to dismiss was served, counsel for the moving party entered into a stipulation for the service of briefs at the present argument. Neither that stipulation nor the motion itself reserves any qualification to the appearance.

It is mentioned in the *Longworth* case, *supra*, that the appearance in this court by the omitted appellees was within six months (the appeal period), but we do not see that to that the court attached much importance. The old summons and severance process probably had some such requirement, but the voluntary appearance by omitted parties is a different thing. The right of the court to allow this sort of thing as a cure is certainly not limited or related to the appeal period. As will be seen later, under our own motion, the power of amending writs of error and citation is freely exercised long after.

3. *Williams, Keene and Claiborne.*

These three defendants, it is argued, should have been cited and served, but to this there is a speedy answer. Not a single line of the intervenor's complaint ever attacked the interest of either or all of these defendants. Coler attacked only a part of complainant Allen's securities, the second real mortgage, and the fishing licenses held in trust for Allen by these three defendants now under consideration are pledges which Coler has not assailed. The property covered by the second mortgage which Coler assails, is a leasehold of harbor area, buildings and equipment (17). The pledge

of the fishing licenses he does not seek to set aside (55). He specifically mentions "the mortgage referred to in paragraph VI" (56). The property covered by that mortgage is very carefully detailed (16–19) by the bill of foreclosure, and no mention is made of these licenses or of these defendants who hold them in trust.

Finally, if he did attack the pledge of these licenses, who is the real party in interest? It is for Allen that Williams, Keene and Claiborne hold these licenses in trust. That is the averment of the foreclosure bill itself (28–30), and Allen, the real party in interest, is now in court properly cited and appearing. It is noticeable, also, that as to these defendants a decree had been taken *pro confesso* (46) before Coler intervened.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

F. W. Coler, Appellant, *vs.* Henry F. Allen, John H. McGraw, as Receiver, and Pacific Northwest Packing Company (a corporation), and The Pacific Northwest Packing Company (a corporation).	No. 713

MOTION FOR AMENDMENT OF CITATION.

To the Honorable the Judges of the above entitled court:

Appellant respectfully moves the court for an order allowing amendment of the citation herein so as to

include the names of Austin Claiborne, W. M. Williams, and W. A. Keene, defendants in the lower court, and that the cause stand over until these defendants be brought in.

BAUSMAN & KEILEHER,

Counsel for Appellant.

ARGUMENT ON FOREGOING MOTION.

The practice allowing amendment and postponement is settled.

Inland & Seaboard Coasting Co. v. Tolson, 136 U. S. 572.

Richardson v. Green, 130 U. S. 104.

Evans v. Bank, 134 U. S. 330.

Dodge u. Knowles, 114 U. S. 430.

Altenberg v. Grant, 83 Fed. 980.

Railroad Equipment Company v. Southern Ry. Co., 92 Fed. 541.

Jacobs v. George, 150 U. S. 415.

The substance of these decisions is that citation is no part of the jurisdictional necessity. That depends upon due filing of transcript. As to the citation the court says:

"It is not jurisdictional. Its only purpose is notice. If by accident it is omitted a motion to dismiss an appeal allowed in open court and at the proper term will never be granted until an opportunity to give the requisite notice has been furnished."

Dodge v. Knowles, supra.

"A motion to dismiss in *Richardson v. Day*, No. 181, must be granted unless the appellants therein shall procure and cause to be issued and served on the appellees therein a citation from this court, in the terms before set forth, returnable at the next term thereof," etc., etc.,

Richardson v. Green, *supra*.

There were in that case a number of parties, some appearing and some omitted.

In *Railroad Equipment Co. v. Southern Ry. Co.*, *supra*., where there were a number of parties, the court says:

"The difficulty which the appellant meets at the threshold of the cause is that it has not made the East Tennessee, Virginia & Georgia Railway Company a party to the appeal by serving a citation upon it. * * * The order will be that the cause stand over for the purpose of giving the appellant an opportunity to apply for a citation against the East Tennessee, Virginia & Georgia Railway Company."

The federal appellate procedure is, so to speak, *in rem*, whilst that of the states is commonly *in personam*. In the former practice, jurisdiction is obtained by two acts, the order of a judge granting that the appeal be allowed and the "cause transferred", and, second, by the lodgment of that cause, by its record, in the appellate court. The citation to the opposite parties is simply notice that the jurisdictional steps have been, or are being, taken, and is no more essential to jurisdiction than, after a seizure in Admiralty, notice or other steps to claimant would be thereafter jurisdic-

tional there, or notice of filing petition in a removal from state to federal courts.

Amendments, accordingly, and fresh citations have been freely allowed in the discretion of the court without regard to the time already elapsed or the running of the appeal period. (*Inland & Seaboard Coasting Co. v. Tolson*, *supra*). In the case of *Evans v. Bank*, *supra*, the court says:

"*The filing of the record* in this case under the second appeal during the term succeeding its allowance, *sufficed for the purpose of jurisdiction*, which was not defeated by the failure to obtain a citation or give bond within two years from the rendition of the decree."

That was an appeal from the circuit court to the supreme court, the period for which is by *Revised Statutes*, sec. 1008, limited to two years. So in *Altenberg v Grant*, *supra*, *alias* citation from appellate court is held proper after time has expired for writ of error.

All this liberality is plain enough when we remember two things; first, that it is the lodgment of the cause and not service of the notice or citation that gives jurisdiction, and, secondly, the provisions of the *Revised Statutes*, sec. 1005. The latter, as is well known, so far requires the allowance of amendments that Justice Curtis said of it: "It is difficult to see, in reading it, what defect cannot now be amended in the discretion of the court" (*Foster, Fed. Pr. 1st ed.* p. 603). Section 1005 refers only to writs of error, but section 1012 makes all "rules, regulations and restrictions" applicable to writs of error apply also to appeals.

Some few cases are found where the proposed amendment was denied because of inexcusable delays, and some few others, where the amendment was too radical, as where the parties were jointly named in a money judgment against them, but in the overwhelming mass of cases it has been granted where asked for: This is especially true since the amendment provision of the Revised Statutes, Sec. 1005. Cases before this enactment must be scrutinized a little. The history and effect of this legislation is described by Mr. Justice Gray in *Walton vs. Marietta Chair Co.*, 157 U. S. 347.

In *Inland & Seaboard Coasting Co. v. Tolson*, *supra*, the court had already dismissed for want of a portion of the parties on appeal, but restored the cause and then allowed amendment and new citation.

We feel it improbable the court will regard the omitted parties as essential to this hearing, but, if it does, the allowance of amendment and fresh citation is so clearly proper as to need, we think, no further argument.

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